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o. 83-1330-CFY
tatus: GRANTED

Title: United States, Petitioner
v.
Thomas J. Hensley

ocketed:
ebruary 10, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Drennen II, Edward G.

ntry	Date	Note	Proceedings and Orders
1	Feb 2 1984		Application for extension of time to file petition and order granting same until March 14, 1984 (O'Connor, February 6, 1984).
2	Feb 10 1984	G	Petition for writ of certiorari filed.
3	Mar 14 1984		DISTRIBUTED. March 30, 1984
4	Mar 29 1984	F	Response requested.
5	Apr 27 1984		Brief of respondent Thomas J. Hensley in opposition filed.
6	May 2 1984		REDISTRIBUTED. May 17, 1984
7	May 21 1984		Petition GRANTED.
8	Jun 29 1984		Joint appendix filed.
9	Jul 5 1984		Brief of petitioner United States filed.
11	Jul 31 1984		Order extending time to file brief of respondent on the merits until August 20, 1984.
12	Aug 20 1984		Brief of respondent Thomas J. Hensley filed.
13	Aug 28 1984		SET FOR ARGUMENT. Monday, November 5, 1984. (2nd case)
14	Sep 12 1984		CIRCULATED.
15	Oct 17 1984	X	Reply brief of petitioner United States filed.
16	Nov 5 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether *Terry* stops (*Terry* v. *Ohio*, 392 U.S. 1 (1968)) may be made only when the police reasonably suspect that a crime is about to be committed or is ongoing at the moment of the stop, or whether such stops may also encompass situations in which the police reasonably suspect that the person to be stopped is wanted in connection with a crime already committed.

2. Whether a "wanted flyer" issued by one police department provides an officer of another department with reasonable suspicion sufficient to justify a brief stop of the suspect while an effort is made to ascertain whether an arrest warrant has been issued for the suspect.

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Cases:

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OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 713 F.2d 220. The order of the district court (App., *infra*, 12a-15a) and the recommendation of the magistrate (App., *infra*, 16a-21a) are unreported.

JURISDICTION

The judgment of the court of apeals (App., *infra*, 10a) was entered on August 9, 1983. A petition for rehearing was denied on December 15, 1983 (App., *infra*, 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Kentucky, respondent was found guilty of being a convicted felon in possession of firearms, in violation of 18 U.S.C. App. 1202(a)(1). Respondent was sentenced to two years' imprisonment. The court of appeals reversed the conviction (App., *infra*, 1a-9a).

1. a. On December 4, 1981, two armed men robbed the Moon Tavern in St. Bernard, Ohio (10/4/82 Tr. 10-12).[1] On December 10, 1981, Officer Kenneth Davis of the St. Bernard Police Department interviewed a woman by the name of Janie Hansford. After advising Hansford of her rights, Officer Davis obtained from her a detailed, handwritten statement in which she implicated herself in the robbery and identified respondent as the driver of the getaway car (*id.* at 11-13, 14, 16). Officer Davis had had prior contact with respondent

[1] "Tr." refers to the transcript of the hearing on respondent's motion to suppress. The suppression hearing was initially held before a magistrate on September 21, 1982. Further hearings were held before the district court on September 28 and October 4, 1982. The transcript of each hearing is separately paginated. In addition, a suppression hearing was held on May 13, 1982, in the case of *Commonwealth of Kentucky* v. *Thomas Hensley*, No. 82-CR-5 (Kenton Co. Cir. Ct.). That hearing followed the Commonwealth's initiation of charges against respondent for possession of a handgun by a convicted felon, in violation of Ky. Rev. Stat. § 527.040 (Supp. 1982). Those charges were dismissed after the state court granted respondent's motion to suppress. (The record does not clearly reveal the basis for the state court's decision. At the suppression hearing itself, the state court indicated its intention to rule for the prosecution (5/13/82 St. Tr. 61-62).) The transcript of the state court suppression hearing (hereinafter cited as St. Tr.) was made a part of the record of the federal proceedings (see App., *infra*, 16a; 9/21/82 Tr. 3).

and considered him to be armed and dangerous (*id.* at 19-20).

On the basis of his knowledge of the robbery, Hansford's statement, and his prior knowledge of respondent, Officer Davis immediately issued the following communication for transmission to neighboring police departments (App., *infra*, 2a n.1):

> "Wanted for Investigation Only for Aggravated Robbery"
>
> Wanted for Investigation of Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:19 a.m., is one Thomas James Hensley, M/W —1/18/44, CTL No. 21528, PICA #325, SS— 295366974, SFF, 190 lbs. Subject LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.

b. The above-quoted communication was sent out by teletype on December 10, 1981, received by the Covington, Kentucky Police Department on that date, and read aloud at roll call each day at every change of shift from that date until December 16, 1981 (5/13/82 St. Tr. 16, 30, 33; 10/4/82 Tr. 9, 22-23). The teletype was never cancelled or withdrawn (*id.* at 9). Covington Police Officers Daniel Cope and David Rasche both had seen the teletype and had had it read to them (*ibid.*). Based on their experience as police officers, both were of the opinion that this type of "flyer" was reliable and usually was followed by an arrest warrant (5/13/82 St. Tr. 17, 33). Officer Cope testified that "[w]e had been advised from Cincinnati that a warrant was forthcoming" (9/28/82 Tr. 8).[2] (Respondent was eventually

[2] St. Bernard, Ohio, is a suburb of Cincinnati, as is Covington, Kentucky. Throughout the record in this case, Cincinnati and St. Bernard appear to have been referenced interchangeably.

charged with the robbery (10/4/82 Tr. 14)). The Covington officers knew respondent and knew where he occasionally stayed, but they had been unable to locate him prior to December 16, 1981 (5/13/82 St. Tr. 31; 9/28/82 Tr. 5, 13; 10/4/82 Tr. 8-9, 24-25). Officer Rassche knew that respondent was a convicted felon (5/13/82 St. Tr. 42). Based on prior police contact, the Covington officers also believed respondent to be armed and dangerous (9/28/82 Tr. 17).

c. On December 16, 1981, a third Covington officer, Officer Terence Eger, came upon respondent and one Albert Green. The two were sitting in an automobile parked in the middle of the street (5/13/82 St. Tr. 43), but upon seeing Officer Eger they "took off" (9/21/82 Tr. 11). Officer Eger radioed Covington police headquarters; set forth below are the pertinent portions of the radio transmission (9/21/82 Tr. 11-16)[9]:

[Officer Eger]:	606.
Dispatcher:	606.
[Officer Eger]:	Concerning a warrant on Tommie Hensley or Al Thomas. They just saw me at the 800 block of Madison and took off.
[Officer Rassche]:	Car 12 to 606. There's supposed to be a robbery warrant out of Ohio.
[Officer Eger]:	Repeat.
[Officer Cope]:	There's possibly a robbery warrant out of Ohio for that subject.
[Officer Eger]:	Which one, Thomas or Hensley?

[9] In the transmission, Albert Green is erroneously referred to as Albert Thomas. The transmission includes Officer Eger's communications with the Covington dispatcher, car-to-car communications among Officers Eger, Rassche, and Cope, and the Covington dispatcher's communications with the Cincinnati Police Department.

[Officer Cope]:	Hensley, Thomas Hensley.
	• • • • •
Dispatcher:	606, can you identify the vehicle?
[Officer Eger]:	White over white Cadillac El Dorado, I believe.
	• • • • •
[Officer Rassche]:	They will probably go to Trevor Street or 806 Holman.
	• • • • •
[Officer Rassche]:	Have you confirmed the warrant?
Dispatcher:	There's nothing local on either one. I need them stopped for information to run a NCIC check.
[Officer Rassche]:	Okay. You might check with the detective bureau. They put a flyer on Hensley on roll call about a week ago or so in reference to a Cincinnati robbery one.
Dispatcher:	Okay. I'll see what I can find.
[Detective Hanlon]:	Crime Bureau, Detective Hanlon speaking.
Dispatcher:	• • •On Tommie Hensley, do we have a robbery warrant out of Ohio on him?
Det. Hanlon:	I don't know whether they did or not, Ma'am.
	• • • • •
Dispatcher:	• • •I believe there was something put on roll call a while ago. Never mind. I will check it. Okay.
	• • • • •
[Officer Cope]:	I have a white convertible Cadillac approaching 18th on Holman at this time. I will be

checking to see the subjects, two subjects in front.

• • • • •

Dispatcher: This is the Covington Police Department. We had something—reference to a Thomas Hensley on roll call about a week ago. I believe it was a robbery warrant from Cincinnati. Is there any way you can check on that without a date of birth on him?

Female Voice: Where are you calling from?

Dispatcher: Covington Police Department. Is'nt this Cincinnati Records?

Female Voice: Yes, it is. Let me transfer you to 3567. Hold on.

• • • • •

[Officer Cope]: 121, I am at 15th and Holman at this time.

Dispatcher: 10-4, 121—we have not confirmed the warrant as of yet. I have Cincinnati hunting for the warrant.

Yes, ma'am. 10-4. This is Covington Police Department. About a week ago we had something reference a Tommie Hensley on roll call. We can't find it now. I believe there is a robbery warrant out of Cincinnati. Is there any way you can—

Female Voice: Well, I can't give you any information, but I can transfer you downstairs and—

Dispatcher: Never mind, never mind, thank you.

By this time, Officer Cope had arrived at the vehicle's location. He stopped the vehicle and ordered respondent and Albert Green out of the car (9/28/82 Tr. 14). Officer Cope stopped the vehicle for the sole purpose of detaining respondent long enough to determine whether a warrant had been issued for his arrest (*id.* at 8-9). If there had been no warrant, Officer Cope would have let respondent go on his way (*id.* at 9). Officer Cope did not stop respondent's vehicle with any intent to search the vehicle, to arrest respondent, or to question him (*ibid.*; 5/13/82 St. Tr. 25).

Officer Cope "felt that [his] life was in jeopardy at the time of the stop" (9/28/82 Tr. 15, 17), and he took no action until back-up units arrived. Officer Rassche was the first to reach the scene. As he was looking straight into respondent's car, the door of which was open, Officer Rassche saw a gun protruding from under the passenger seat (*id.* at 19, 24; 5/13/82 St. Tr. 28, 34-35). Because Albert Green had been sitting in the passenger seat, he was arrested for carrying a concealed weapon (*id.* at 35; 9/28/82 Tr. 23).[4] "Immediately after finding [the first] gun," the officers searched a jacket lying between the two front seats and an open gym bag on the back seat "[f]or other weapons" (*id.* at 24; 5/13/82 St. Tr. 36). One hand gun was found wrapped inside the jacket, and another was found in the gym bag (*id.* at 20-21, 28-29). All three guns were loaded (*id.* at 20). The gym bag also contained hypodermic needles, several ski masks, a change of clothes, and a controlled substance (*ibid.*). Respondent, who owned the car and had

[4] After respondent admitted owning all of the guns discovered in the car, the United States moved to dismiss the indictment against Green, and the district court granted the motion.

been driving it, was then arrested for carrying two concealed weapons (*id.* at 35-36, 38).

2. Prior to trial, respondent moved to suppress all evidence arising out of the search of his vehicle. Adopting the recommendation of the magistrate (App., *infra*, 16a-21a), the district court denied respondent's suppression motion. The district court ruled (*id.* at 14a-15a):

> The St. Bernard Police were justified in issuing the teletype and Officer Cope was justified in stopping [respondent]. Once stopped, the officers could ask the men to step out of the car. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Having observed a weapon in plain view, the officers were justified in seizing the weapon and in searching further for weapons that might be accessible to the two men. • • • The discovery of the weapons gave the officers probable cause to arrest [respondent]. *Adams* v. *Williams*, 407 U.S. 143 (1972).

3. The court of appeals reversed, holding that respondent had been illegally arrested. The court held that the Covington police were not justified in making a *Terry* stop of respondent, reasoning that this Court has manifested a "clear intention to restrict investigative stops to settings involving the investigation of ongoing crimes" (App., *infra*, 8a-9a) and observing that "the government has not shown us any • • • 'exigent circumstances' that would have justified the Covington police in stopping [respondent]" (*id.* at 8a). The court of appeals summarized its holding as follows (*id.* at 9a):

> [W]e refuse to expand the *Terry* doctrine to encompass police attempts to round up people against whom arrest warrants *may* have been issued. This "arrest now, verify warrant later" policy that the government urges us to uphold simply stretches the constraints of the Fourth Amendment beyond all reasonable limits.

> In conclusion, we hold that the Fourth Amendment does not permit police officers in one department to seize a person simply because a neighboring police department has circulated a flyer reflecting the desire to question that individual about some criminal investigation that does not involve the arresting officers or their department.[5]

REASONS FOR GRANTING THE PETITION

The court of appeals' conclusion that the stop in this case violated respondent's Fourth Amendment rights apparently rested on two theories: first, that the officers had to have a basis to suspect respondent of being engaged in criminal activity at the time of the stop itself; and second, that the flyer issued by the St. Bernard Police Department did not provide Covington Officer Cope with "'specific and articulable facts' that would have justified the stop" (App., *infra*, 8a). The court was patently wrong on both counts, and its decision conflicts with numerous decisions of this Court and other courts of appeals. Moreover, the decision threatens to have serious and widespread practical consequences for effective law enforcement. As the cases cited at pages 13-14, *infra*, demonstrate, the practice of making investigative stops on the basis of "wanted" flyers is quite common, but the decision below would bring a halt to interdepartmental cooperation and require officers simply to turn their backs on suspected criminals.[6] The court of appeals gave no reasoned justi-

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[5] The court also refused to apply the "collective knowledge" doctrine in this case, holding that even if the St. Bernard Police Department had probable cause to arrest respondent, that knowledge could not be imputed to the Covington police because the two departments were not working directly together on the investigation (App., *infra*, 4a-6a). We do not seek review of this aspect of the court of appeals' decision.

[6] The decision below already has produced adverse practical consequences. We are advised by the United States Attorney

fication for invalidating a long-standing and effective method of cooperation among police departments of different jurisdictions, and its error should be corrected.

1. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that law enforcement officers may stop a person and briefly detain him for questioning upon reasonable suspicion that he is connected with criminal activity. See also, *e.g.*, *Michigan* v. *Summers*, 452 U.S. 692 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972). Apparently because *Terry* involved the "stop and frisk" of an individual who seemed about to commit a robbery, the court of appeals here concluded that investigative stops are permissible only in "settings involving the investigation of ongoing crimes * * *" (App., *infra*, 8a-9a). In thus elevating the factual circumstances in *Terry* to a prerequisite for an investigative stop, the court of appeals clearly erred.

Terry's holding that investigative stops made on reasonable suspicion do not violate the Fourth Amendment rests on a balancing of the "limited intrusions on the personal security of those detained" against the "substantial law enforcement interests" advanced by permitting such brief detentions. *Michigan* v. *Summers*, 452 U.S. at 699. See also *Dunaway* v. *New York*, 442 U.S. 200, 209 (1979). Although the officer who observes an individual whom he reasonably suspects of having committed a past crime may not be in a position to prevent or halt ongoing criminal activity, he is certainly in

for the Eastern District of Kentucky that the police departments of Kenton County, Boone County, Covington, Erlanger, and Florence (all located in Kentucky) have ceased making investigative stops on the basis of other departments' "wanted" flyers as a result of the decision below; in the past, these police departments each made an average of four or five such stops each month. Presumably, other police departments within the Sixth Circuit have responded in similar fashion.

a position to serve the "substantial law enforcement interest[]" in apprehending criminals and bringing them to justice. Such an officer is no more required "to simply shrug his shoulders * * * and allow a crime to occur or a criminal to escape" (*Adams* v. *Williams*, 407 U.S. at 145) than the officer who observes ongoing criminal activity. In either situation, "it may be the essence of good police work to adopt an intermediate response" by briefly stopping the suspicious individual "in order to determine his identity or to maintain the status quo momentarily while obtaining more information * * *." *Id.* at 145-146.[7]

Indeed, this Court's post-*Terry* decisions expressly state that law enforcement officers may make investigatory stops based on reasonable suspicion of past criminal activity. Thus, in *Florida* v. *Royer*, No. 80-2146

[7] On the other side of the balance, the intrusion undertaken by the Covington police could not have been more limited. Officer Cope testified that he intended to detain respondent only long enough to determine whether there was an outstanding warrant for his arrest; had there been none (and had independent probable cause to arrest respondent not developed through the discovery of the guns), respondent would have been released (see page 7, *supra*). Depending perhaps upon the amount of the time required for the St. Bernard police to reach Covington, it may well be that the Covington police would have needed probable cause to take the action requested in the flyer of detaining respondent until the St. Bernard police could assume custody of him. Cf. *Dunaway* v. *New York*, *supra*. But it is undisputed on the record in this case that the Covington police did not intend to take the action requested in the flyer. Rather, as the radio transmission indicates (see pages 4-6, *supra*), the Covington police immediately sought to verify the existence of a warrant. Although it became unnecessary to continue those efforts when the police observed the first gun in plain view in respondent's vehicle, it is clear that the court of appeals completely mischaracterized this case as an "arrest now, verify warrant later" situation (App., *infra*, 9a). In reality, the facts show that this is a "stop now, try to verify warrant immediately" case.

(Mar. 23, 1983), the Court recently observed that *Terry* stands for the principle that "certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person *has committed* or is about to commit a crime" (slip op. 6 (emphasis added)).[8] Likewise, in *Michigan* v. *Summers*, 452 U.S. at 699 n.9, the Court characterized its decision in *Brown* v. *Texas*, 443 U.S. 47 (1979), as holding that the statute there at issue, requiring individuals to identify themselves, was unconstitutional as applied "because the police did not have any reasonable suspicion that the petitioner *had committed* or was committing a crime" (emphasis added). Perhaps the Court's clearest statement that investigative stops may be based on reasonable suspicion of past criminal activity came in *United States* v. *Cortez*, 449 U.S. 411 (1981). There, after stating that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," the Court added that "[o]f course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct." *Id.* at 417 & n.2. See also *Kolender* v. *Lawson*, No. 81-1320 (May 2, 1983), slip op. 2 (Brennan, J., concurring).[9] The

[8] The court of appeals relied exclusively on *Florida* v. *Royer*, *supra*, for its conclusion that the stop in this case was impermissible under *Terry* and its progeny (see App., *infra*, 6a-7a). But the Court in *Royer* held only that what had commenced as a reasonable investigative detention later escalated into "a more serious intrusion on [Royer's] personal liberty than is allowable on mere suspicion of criminal activity" (slip. op. 10-11). That escalation occurred only after Royer had been taken to "a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions" (*id.* at 11). Clearly, the stop in the instant case never escalated to the level found objectionable in *Royer*.

[9] In addition to this Court's decisions, several court of appeals decisions likewise indicate—explicitly or implicitly—that the

court of appeals' totally unprecedented limitation on *Terry* stops thus requires correction by this Court.

2. The court of appeals also erred in concluding that the stop of respondent's vehicle was unlawful because the wanted flyer failed to provide Officer Cope with sufficient facts upon which to make his own determination of reasonable suspicion. The flyer stated that respondent was "Wanted for Investigation Only for Aggravated Robbery" and supplied details concerning respondent's identity (see page 3, *supra*). This information *by itself*—regardless of Officer Cope's knowledge of the facts giving rise to the flyer—fully justified the "intermediate response" of stopping respondent's vehicle and briefly detaining him in order to determine if a warrant for his arrest had been issued.[10]

The conclusion of the court below that the flyer was insufficient to justify the stop is at odds with numerous court of appeals decisions holding that an officer may make an investigative stop—or, where appropriate, an arrest—in reliance on a police wanted bulletin or radio lookout, and that he may do so even though he has no personal knowledge of the facts warranting such action. See, *e.g.*, *United States* v. *Jackson*, 652 F.2d 244,

Terry doctrine applies when an officer has reasonable suspicion of past criminal activity. See, *e.g.*, *United States* v. *Roper*, 702 F.2d 984, 989 (11th Cir. 1983); *United States* v. *Mobley*, 699 F.2d 172 (4th Cir. 1983), cert. denied, No. 82-6441 (Apr. 25, 1983); *United States* v. *Burnette*, 698 F.2d 1038, 1047 (9th Cir. 1983), cert. denied, No. 82-6532 (May 16, 1983); *United States* v. *Merritt*, 695 F.2d 1263, 1268 n.8 (10th Cir. 1982), cert. denied, No. 82-6306 (May 2, 1983); *United States* v. *Streifel*, 665 F.2d 414, 421 (2d Cir. 1981); *United States* v. *Sevi*, 662 F.2d 277, 283 (4th Cir. 1981), cert. denied, 455 U.S. 960 (1982).

[10] Because the flyer was six days old, it was reasonable to anticipate that the information regarding respondent's participation in the robbery had ripened into probable cause. By the same token, the flyer was hardly so old that it should have been discarded as stale.

248-249 n.3 (2d Cir.), cert. denied, 454 U.S. 1067 (1981); *United States* v. *Robinson*, 536 F.2d 1298 (9th Cir. 1976); *United States ex rel. Mungo* v. *LaVallee*, 522 F.2d 211, 214 (2d Cir. 1975), cert. denied, 434 U.S. 929 (1977); *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 400-401 (7th Cir.), cert. denied, 421 U.S. 1016 (1975); *United States* v. *Stevens*, 509 F.2d 683, 687 & n.6 (8th Cir.), cert. denied, 421 U.S. 969 (1975); *United States* v. *Hernandez*, 486 F.2d 614 (7th Cir. 1973), cert. denied, 415 U.S. 969 (1974);[11] *United States* v. *Impson*, 482 F.2d 197, 199 (5th Cir.), cert. denied, 414 U.S. 1009 (1973); *United States* v. *Maryland*, 479 F.2d 566, 569 (5th Cir. 1973); *Daniels* v. *United States*, 393 F.2d 359 (D.C. Cir. 1968); *Smith* v. *United States*, 386 F.2d 532, 533 (9th Cir. 1967). See also *United States* v. *Roper*, *supra* (upholding action of officer who, having seen bond company's flyer describing defendant and his vehicle and stating that defendant was wanted for federal bail jumping, stopped defendant's car for purpose of determining if a probation violation warrant for defendant's arrest had been issued); 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978), quoted with approval in *Michigan* v. *Summers*, 452 U.S. at 700-701 n.12.

In general, these cases stand for the proposition that an officer who receives a police bulletin has "the same right" to make a stop or an arrest as the officer who issued the bulletin. *United States* v. *Jackson*, 652 F.2d at 249 n.3. As the Fifth Circuit stated in *United States* v. *Impson*, 482 F.2d at 199, an "officer can act on the basis of information of which he has no personal knowledge which has been relayed to him by police transmission facilities," but if the bulletin "is the sole cause for the detention * * * then the government has the burden of showing that the information on which the action was based *itself* had a reasonable foundation" (emphasis in original). See also *United States* v. *Robinson*, 536 F.2d at 1299-1300; *United States* v. *Stevens*, 509 F.2d at 687 n.6 ("[a] police officer is entitled to view information supplied via police radio as a trustworthy basis for his actions"); *Daniels* v. *United States*, 393 F.2d at 361. Cf. *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971) ("Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.").

The practical basis for these decisions is clear: effective law enforcement would be impossible if police officers could not act on directions and information transmitted from one officer to another. As the court of appeals observed in *United States* v. *Robinson*, 536 F.2d at 1299, "officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." And, at the same time as it facilitates effective law enforcement, the rule fully protects the Fourth Amendment rights of those detained or arrested by requiring

[11] The court below attempted to distinguish *Hernandez* on the basis that "the officer knew that the vehicle he stopped was thought to contain illegal aliens," and that "[h]is intrusion on the suspect's privacy was limited to the specific purpose of verifying or dispelling [the suspicion]" (App., *infra*, 8a). But here Officer Cope likewise knew that the vehicle he stopped contained a suspected robber, and his intrusion was limited to the specific purpose of determining whether a warrant for his arrest had been issued. At the time of the stop in *Hernandez*, the officer had no more information than Officer Cope did when he stopped respondent.

that the police officer initiating the chain of communication have sufficient knowledge to constitute reasonable suspicion or probable cause.[13]

Moreover, the rule is as applicable to communications between different police departments or law enforcement agencies as it is to communications within a single department. See, *e.g.*, *United States* v. *Impson*, *supra*; *United States* v. *Maryland*, *supra*; *Smith* v. *United States*, *supra*. See also *United States* v. *Roper*, *supra*. Given the ease with which criminal offenders may move quickly among various police jurisdictions, officers in one jurisdiction must be able to respond swiftly to wanted bulletins from other jurisdictions without making time-consuming personal determinations as to the existence of reasonable suspicion or probable cause. The alternatives are a national police force or a requirement that officers turn their backs on suspected offenders simply because they lack personal knowledge of the facts leading to the issuance of a wanted bulletin. Nothing in the Fourth Amendment justifies either result.

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[13] In the instant case, there is no question that the St. Bernard police officer who issued the wanted flyer had ample reason to suspect respondent of the robbery based on Janie Hansford's "detailed handwritten statement" (App., *infra*, 2a). Indeed, the district court "concluded that Janie Hansford's statement actually provided the St. Bernard police with a sufficient basis for probable cause * * *" to arrest respondent (*id.* at 4a), a conclusion the court of appeals did not disturb.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the governing legal principles appear to be well established, the Court may wish to consider summary reversal.

Respectfully submitted.

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FEBRUARY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

THOMAS J. HENSLEY, DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed August 9, 1983

Before: MERRITT and MARTIN, Circuit Judges; PORTER, Senior District Judge.*

MERRITT, Circuit Judge. In this criminal case, defendant Thomas J. Hensley appeals his conviction under an indictment charging possession of a firearm by a convicted felon in violation of 18 U.S.C. App. § 1202(a)(1). Hensley maintains that his conviction rests on evidence obtained through an illegal search by officers of the Covington, Kentucky Police Department. We agree, and therefore reverse the conviction.

On December 10, 1981, Officer Kenneth Davis of the St. Bernard, Ohio Police Department interviewed a woman named Janie Hansford regarding the armed robbery that had occurred six days earlier at the Moon

*The Honorable David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

Tavern in St. Bernard. Having been informed of her rights, Hansford gave the officer a detailed handwritten statement that implicated Hensley in the robbery. Specifically, she stated that she had accompanied her boyfriend, Alan Pfeiffer, to the Moon Tavern in the early morning hours of the day of the robbery and had ascertained the time that the establishment opened for business. She stated further that shortly after the robbery, Sonny Pfeiffer (Alan's brother) told her that he and one "Dale" had robbed the tavern, and that defendant Hensley had driven the gateaway [*sic*] car. Hansford also recalled that Sonny Pfeiffer showed her some money that he claimed to have obtained in the robbery.

Although Officer Davis did not believe that he had probable cause to arrest Hensley, he nevertheless issued a flyer for circulation to neighboring police departments, requesting that Hensley be stopped "for investigation only" of the Moon Tavern robbery.[1] In response to this flyer, Officer Daniel Cope of the Covington, Kentucky Police Department stopped Hensley while the latter was driving his car within the Covington city limits. Knowing that Hensley was wanted in connection with an aggravated robbery, Officer Cope drew his gun and ordered the defendant and his passenger (and eventual co-defendant) Albert Green to step out of the car and place their hands on the trunk until a backup unit arrived. Officer Cope testified that he felt his life "was in jeopardy at the time of the stop." (Tr. 5/28/82 at 15.)

[1] In its entirety, the flyer reads as follows:

> "Wanted for Investigation Only for Aggravated Robbery"
> Wanted for Investigation of Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:19 a.m., in one Thomas James Hensley, M/W—1/18/44, CTL No. 21528, PICA #325, SS—296366974, SFF, 190 lbs. Subject LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.

The officer also testified that he intended to detain Hensley and Green only to determine whether or not there was a warrant for Hensley's arrest. In the absence of a warrant, Officer Cope intended to release Hensley. (Tr. 5/13/82 at 9.)

When Officer David Rassache arrived, he looked through the car door that Green had left open and saw the butt end of a gun protruding from under the seat. Proceeding to search the entire vehicle, the officers discovered two more firearms, and subsequently placed both Green and Hensley under arrest.

Hensley argues that the police acted illegally in stopping him and searching his car, and that the weapons seized from the car should therefore have been suppressed. We have no doubt—and the government does not contest—that the encounter between the Covington police officers and the appellant constituted a Fourth Amendment event.[2] By pulling Hensley over, ordering him out of the car, and holding him at gunpoint, Officer Cope effected a "seizure" of Hensley's person within the meaning of the Amendment. *Delaware* v. *Prouse*, 440 U.S. 648 (1979). In *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968), the Supreme Court observed:

> It is quite plain that the Fourth Amendment governs "seizures" of persons which do not eventuate in a trip to the station house and prosecution of crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

[2] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV.

See also Michigan v. *Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981). Under the general rule governing Fourth Amendment settings, "every arrest' and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, *supra*, 101 S.Ct. at 2593; *see also Dunaway* v. *New York*, 442 U.S. 200, 207-09 (1979). We therefore begin our analysis of the instant case by considering whether the Covington police had probable cause to arrest Hensley *before* Officer Ramache saw the weapon in the appellant's car.

The District Court concluded that Janie Hansford's statement actually provided the St. Bernard police with a sufficient basis for probable cause, under the standards enunciated in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *United States* v. *Garrett*, 627 F.2d 14 (6th Cir. 1979). Hensley, however, notes that Officer Davis, who interviewed Hansford, did not believe that her statement provided grounds for the probable cause necessary to secure a warrant for Hensley's arrest. Hence, the St. Bernard police did not obtain such a warrant, and sought Hensley "for investigation only."

We agree with Hensley that even if the St. Bernard police did in fact have probable cause, this fact alone would not endow their Covington counterparts with probable cause to make a full-fledged, warrantless arrest. The Supreme Court has held that "the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment of the same issue." *Whiteley* v. *Warden*, 401 U.S. 560, 566 (1971). The Covington police officers—who were wholly ignorant of the specific information provided by Hansford—clearly lacked probable cause to arrest Hensley when Officer Cope pulled him over. As the officer testified, Hensley was detained only because

the Covington Police Department was attempting to verify the existence of an arrest warrant. Although this Court has upheld the general rule that probable cause for arrest may emanate from collective police knowledge, *see United States* v. *Calandrella*, 605 F.2d 236, 246 (6th Cir. 1979), *United States* v. *Killebrew*, 594 F.2d 1103, 1105 (6th Cir. 1979), *United States* v. *McManus*, 560 F.2d 747, 750-51 (6th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978), these cases all considered the collective knowledge of police officers who were directly involved in the investigations that prompted the various arrests. In the instant case, by contrast, there was no such direct investigative relationship between the two police departments; absent an arrest warrant, the Covington police knew that they would have to release Hensley. We refuse to extend the "collective knowledge" rule to circumstances where the degree of police cooperation is so attenuated.

Moreover, we do not believe that the Covington officers' knowledge of the flyer asking that Hensley be stopped "for investigation only" would justify the Covington police in concluding that a warrant existed for his arrest. These circumstances distinguish the case from *United States* v. *McDonald*, 606 F.2d 552 (5th Cir. 1979), where the court held that the combination of an FBI "wanted" flyer and a National Crime Information Center printout showing an outstanding arrest warrant gave police officers probable cause to arrest a suspect. On the contrary, the flyer in the instant case plainly indicated that no arrest warrant had been obtained.

Our inquiry, however, does not end here. The Supreme Court has recognized certain instances where the police may legally seize a person while lacking probable cause to arrest for a crime. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court considered seizures stemming from the "necessarily swift [police] action predicated

upon the on-the-spot observations of the officer on the beat," and held that in order to justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 20, 21. Under this rule, the *Terry* Court upheld the "stop and frisk" of an individual who seemed to be about to commit a robbery. In *Adams* v. *Williams*, 402 U.S. 143 (1972) the Court extended the *Terry* rationale to an investigative stop based on an informant's report rather than on a police officer's own observations. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the Court recognized another exception to the probable cause requirement by permitting border patrols to detain vehicles that they suspected of containing illegal aliens. Carefully circumscribing this exception, the Court emphasized that the patrols could detain the driver and passengers of such vehicles only briefly, and could question them only for the purpose of enforcing the immigration laws. *Id.* at 821-22. Finally, in *Michigan* v. *Summers*, 452 U.S. 692 (1981), the Supreme Court approved the detention of the occupant of a house while police searched the house pursuant to a warrant, even though the police lacked probable cause to arrest the individual before the search.

Despite the expansive trend embodied in this line of cases, the recent case of *Florida* v. *Royer*, ___ U.S. ___, 51 U.S.L.W. 4293 (1983) demonstrates that the Court still considers the investigative stop a narrowly drawn exception to the rule that police must have probable cause to make a seizure. *Royer* involved the detention at Miami International Airport of a traveler who fit the "drug courier profile" that law enforcement officers use to detect individuals engaged in illegal narcotics traffic. The Court held that the questioning of the traveler in a small room by two officers amounted to an arrest without probable cause, and that this conduct was too intrusive to constitute a legitimate investigative stop under *Terry* and its progeny.

Using the guidance supplied by these cases, we must determine whether, under the Fourth Amendment, the Covington police officers could validly stop Hensley solely because of the St. Bernard Police Department's flyer requesting that he be detained "for investigation only." The government points out that in *United States* v. *Hernandez*, 496 F.2d 614 (7th Cir. 1973), the court upheld an investigative stop by an officer who had received a radio bulletin concerning a vehicle suspected of carrying illegal aliens. Although the bulletin did not provide the officer with probable cause to arrest, the court decided that *Terry* and *Adams* v. *Williams*, *supra*, afforded the officer the opportunity to stop the vehicle and "attempt to corroborate the bulletin." *United States* v. *Hernandez*, *supra*, 496 F.2d at 617.

Although there is some similarity between *Hernandez* and the facts present here, certain distinctions between the two cases prevent us from following the Seventh Circuit in this instance. While the radio bulletin in *Hernandez* apparently described very recent events and led to prompt police action, the St. Bernard Police Department's flyer in the instant case concerned a robbery that was already nearly a week old when the flyer was issued and nearly two weeks old when the Covington police finally stopped Hensley. Thus, the police officer in *Hernandez* had reason to believe that he was investigating an ongoing crime, whereas Officer Cope, on the other hand, had absolutely no reason to believe that Hensley was committing any crime at the time of the stop.

The significance of this distinction lies in the Fourth Amendment principle that exigent circumstances will sometimes permit a police officer to skirt the Amendment's warrant requirements in order to prevent the

commission of a crime or the escape of a suspected felon. *See Terry* v. *Ohio*, *supra*, 392 U.S. at 20; *Warden* v. *Hayden*, 387 U.S. 294 (1967) (police officer in hot pursuit of suspect not required to obtain search warrant). Indeed, the rationale for the *Terry* line of cases discussed above stems from the Supreme Court's recognition of the need for police conduct that is "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry* v. *Ohio*, *supra*, 392 U.S. at 20. In the case at bar, however, the government has not shown us any such "exigent circumstances" that would have justified the Covington police in stopping Hensley.

Furthermore, in *Hernandez*, the officer knew that the vehicle he stopped was thought to contain illegal aliens. His intrusion on the suspect's privacy was limited to the specific purpose of verifying or dispelling "the suspicion that the immigration laws were being violated," *Florida* v. *Royer*, *supra*, 51 U.S.L.W. at 4256 (discussing *United States* v. *Brignoni-Ponce*, *supra*), and the stop was "likely to resolve the matter one way or another very soon . . ." *Michigan* v. *Summers*, *supra*, 452 U.S. at 701 n.14 (quoting 3 W. LaFave, Search and Seizure § 9.2 p.40 (1978). Officer Cope, however, had much less specific information. He knew only that Hensley was wanted for questioning in connection with a certain robbery. The St. Bernard flyer contained no information regarding Hensley's purported role in the robbery, and thus contained no "specific and articulable facts" that would have justified the stop.

The government maintains, however, that the flyer provided sufficient justification for stopping Hensley while the Covington police determined whether or not there was a warrant for his arrest. In view of the Supreme Court's clear intention to restrict investigative stops to settings involving the investigation of ongoing

crimes, we refuse to expand the *Terry* doctrine to encompass police attempts to round up people against whom arrest warrants *may* have been issued. This "arrest now, verify warrant later" policy that the government urges us to uphold simply stretches the constraints of the Fourth Amendment beyond all reasonable limits.

In conclusion, we hold that the Fourth Amendment does not permit police officers in one department to seize a person simply because a neighboring police department has circulated a flyer reflecting the desire to question that individual about some criminal investigation that does not involve the arresting officers or their department. Because appellant Hensley's conviction rests on evidence obtained through an illegal arrest, his conviction must be reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-5669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

THOMAS J. HENSLEY, DEFENDANT-APPELLANT.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

[Filed: Aug. 9, 1983]

JUDGMENT

Before: MERRITT and MARTIN, *Circuit Judges;* and PORTER, *Senior Circuit Judge.*

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk*

/s/ John P. Hehman
Clerk

Issued as Mandate: December 27, 1983

A True Copy.

Attest:

/s/ Audrey Crockett
AUDREY CROCKETT, *Deputy Clerk*

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-5669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS J. HENSLEY, DEFENDANT-APPELLANT

[Filed: December 15, 1983]

ORDER DENYING PETITION FOR REHEARING

Before: MERRITT and MARTIN, *Circuit Judges;* PORTER, *Senior District Judge* *

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN, *Clerk*

*The Honorable David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Criminal No. 82-29

UNITED STATES, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT

[Filed: Oct. 19, 1982]

ORDER

FINDINGS OF FACT

On December 16, 1981, defendant Hensley's automobile was subjected to a warrantless search. An evidentiary hearing was held on September 21, 1982, before a United States Magistrate, on defendant's motion to suppress the evidence thereby obtained. In his findings of fact, the magistrate determined that Officer Dan Cope of the Covington Police stopped defendant on December 16, 1981, after hearing another officer request a warrant check on defendant and after recalling having heard at roll call and read a request from Cincinnati police that defendant be stopped for investigation of a robbery. After Officer Cope had pulled defendant's car over and asked defendant and his passenger, Albert Green, to step out of the car, Officer David Rashe, who had just arrived, looked inside the open door of the car and saw a gun lying under the passenger's seat. Defendant was placed under arrest. When a search of the front seat disclosed a second gun wrapped in Hensley's jacket, defendant was placed under arrest. The magistrate overruled defendant's motion to suppress the evidence the search produced.

An additional evidentiary hearing in conjunction with defendant's objections to the magistrate's findings was

held on September 28, 1982. In response to the court's order of that date, the government entered in evidence the teletype which Officer Cope recalled prior to stopping defendant. The teletype was generated by the St. Bernard, Ohio, Police and it indicates that defendant was wanted for investigation of an aggravated robbery which occurred at the Moon Tavern in St. Bernard on December 4, 1981. A further evidentiary hearing on October 4, 1982, revealed that, in issuing the teletype, the St. Bernard police had relied on a statement made by Janie Hansford on December 10, 1981. Hansford related that she and her boyfriend, Alan Pfeiffer, had obtained information concerning the hours of the Moon Tavern, which was relayed to Alan's father, Sonny Pfeiffer. Later, Sonny described to Hansford the robbing of the tavern, telling her that defendant Hensley had driven the getaway car. The teletype issued the same day, December 10, 1981, and Hensley was stopped six days later.

CONCLUSIONS OF LAW

The decision of the magistrate that, in asking defendant to pull over and step out of his car the police were conducting a lawful investigatory stop, must be affirmed. The St. Bernard Police were in possession of "specific and articulable facts which taken together with rational inferences from these facts reasonably warrant(ed) intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). The teletype was the basis of the suspicion that defendant was involved in criminal activity. In such a situation, where a stop is based on information communicated via police channels, the law requires that facts sufficient to meet *Terry* be in the hands of the agency issuing the transmission. *Whiteley* v. *Warden*, 401 U.S. 560 (1971); *United States* v. *Robinson*, 536 F.2d 1298 (9th Cir. 1976).

In issuing the teletype, the St. Bernard Police relied on the statement of Hansford that Pfeiffer had admit-

ted to her robbing the Moon Tavern and being assisted by defendant. The Supreme Court has held an informant's tip may provide the facts that are the basis of a valid *Terry* stop. *Adams* v. *Williams*, 407 U.S. 143 (1972). In this case, however, there was double hearsay: the informant (Hansford) relayed facts she had obtained from another informant (Pfeiffer). Nevertheless, the Supreme Court has approved the use of double hearsay as a foundation for probable cause. *Spinelli* v. *United States*, 393 U.S. 410 (1964). If it may provide a basis for probable cause, *a fortiori* double hearsay will satisfy the less stringent demands of a stop.

Though *Adams* v. *Williams*, *supra*, does not appear to demand it, the facts in this case meet the test devised by the Supreme Court for assessing whether informants' tips provide a sufficient basis for probable cause: the facts show the informant is credible and her information reliable. *Aguilar* v. *Texas*, 378 U.S. 108 (1964). Hansford's admission of tangential participation in a robbery is a declaration against interest that establishes her veracity. The wealth of details concerning the events surrounding the robbery establishes a reliable basis for her information. As required by the Sixth Circuit in *United States* v. *Garrett*, 627 F.2d 14 (6th Cir. 1979), the facts related by Hansford's informant also must pass the credibility and reliability requirements of *Aguilar*. Pfeiffer's admission that he robbed the tavern lends his story veracity and his assertion that his information is first-hand lends it reliability.

Thus, taken together, the admission of Pfeiffer and that of Hansford, as contained in Hansford's statement, are sufficiently credible and reliable to arouse a reasonable suspicion of criminal activity by defendant and to constitute the specific and articulable facts needed to underly a stop. The St. Bernard Police were justified in issuing the teletype and Officer Cope was justified in stopping defendant. Once stopped, the officers could

ask the men to step out of the car. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Having observed a weapon in plain view, the officers were justified in seizing the weapon and in searching further for weapons that might be accessible to the two men. *United States* v. *Hare*, 589 F.2d 1291 (6th Cir. 1979); *United States* v. *Wilkerson*, 586 F.2d 621 (D.C. Cir. 1978). The discovery of the weapons gave the officers probable cause to arrest defendant. *Adams* v. *Williams*, 407 U.S. 143 (1972).

The court having considered all of the above, along with the report and recommendation of the United States Magistrate, said motion to suppress on behalf of defendant Hensley be and hereby is denied.

This 19th day of October, 1982.

/s/ William O. Bertelsman

WILLIAM O. BERTELSMAN
Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Criminal No. 82-29

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT

[Filed: Sep. 22, 1982]

RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The defendant, Thomas J. Hensley, filed a motion to suppress all evidence and the fruits thereof arising out of the warrantless search of his automobile on December 16, 1981. An evidentiary hearing was held on September 21, 1982, the United States present by Assistant United States Attorney Jim Arehart and the Defendant Hensley present in open court and represented by Edward Dressen. The parties stipulated into evidence the Transcript of Evidence and Proceedings in *Commonwealth of Kentucky* v. *Thomas Hensley*, Kenton Circuit Court Case No. 82-CR-5. The following Covington Police Officers then testified that their testimony at this federal suppression hearing would be the same as in the state suppression hearing: 1) Officer David Raabe; 2) Officer Terence Eger; 3) Officer Dan Cope. The Defendant Hensley also stated that his testimony would be the same as in the state suppression hearing. Covington Police Officer Schonaker then played tapes from the Covington Police Department regarding radio transmissions to and from the Covington Police Dispatcher concerning this incident.

OFFICER DAN COPE:

On the afternoon of December 16, 1981, Officer Cope was on duty and operating his police vehicle when he heard a radio transmission from Officer Eger asking for a warrant check on the defendant. Cope had additional personal information based upon a flyer which had been read at the regular Covington roll call concerning a request from the Cincinnati Police to stop for investigation the Defendant Hensley. This officer then proceeded to 1806 Holman Street in Covington where he observed the defendant driving a white 1973 Cadillac. This officer immediately pulled the defendant over and instructed both the defendant and his passenger, Albert Green, to step out of the car and put their hands on the roof.

Additional Covington Police Officers arrived on the scene including Officer Raabe, and Officer Cope explained how the first gun was discovered.

TRANSCRIPT OF EVIDENCE, p.8

Q.58 And some time after Officer Raabe came, he went to Mr. Hensley's vehicle and found these guns; is that correct Sir?

A. As soon as I asked Mr. Hensley and Mr. Green to step up on the sidewalk, Officer Raabe stepped inside the open passenger door. Lying in sight with the door open under the front seat was an H&R .32 caliber revolver.

In addition to the H&R .32 caliber found under the passenger seat, a second gun was found underneath a coat lying on the front seat of the defendant's car. A third gun was found in a gym bag that was located on the back seat of the car, but which was not visible to the investigating officer.

Cope stated that there was no traffic offense involved, no consent to search given by the defendant, no search warrant, nor was the vehicle being inventoried.

Cope did recall approximately one or two weeks prior to this incident a roll call at the Covington Police Headquarters involving the Defendant Hensley, and stated that he also recalled personally reading this particular flyer.

OFFICER DAVID RASHE:

When Officer Rashe arrived on the scene, both the Defendant Hensley and the Defendant Green were outside the motor vehicle:

TRANSCRIPT OF EVIDENCE, p. 28

Q.20 Now, if you could, tell us the circumstances when you got to the car exactly what you did, Sir?

A. Both subjects were standing outside the car. You could look right into the car, the passenger side of the seat there, below the seat, underneath the seat, the butt of the gun was protruding out.

After locating the weapon within plain view which was under the passenger seat, Rashe placed the Defendant Green under arrest for carrying a concealed weapon. He then searched for additional weapons in the front seat and located the second gun wrapped up in the Defendant Hensley's leather jacket. Officer Rashe also was aware that there was a flyer out of Cincinnati involving the Defendant Hensley for suspected robbery. The gym bag located in the back seat was open with hypodermic syringes sticking out of the bag in plain view. Officer Rashe testified that Officer Cope actually searched that bag and found a third gun along with a small quantity of drugs, ski mask, and tennis shoes. Hensley was placed under arrest, according to this officer, after the second gun was located wrapped up in his leather jacket.

OFFICER TERENCE EGER:

On the morning of December 16, 1981 Officer Eger saw the Defendant Hensley on Madison Avenue, and his vehicle was blocking traffic. The Officer told Mr. Hensley to move his vehicle, and then requested by radio transmission if there were any warrants on the defendant. In response to Eger's inquiry, Officer Rashe advised by means of radio transmission that he thought there was a warrant for Mr. Hensley in Cincinnati.

THOMAS J. HENSLEY:

The defendant admitted ownership of both the vehicle and all personal property located in it. The gun located under the passenger seat, according to Hensley, had been there for approximately one week, and was not visible without leaning into the car and searching for it.

TAPES:

The tapes reveal radio conversations between the Covington Police Dispatcher and the officers who subsequently arrived on the scene. An officer inquired concerning a warrant on Tommy Hensley, and stated that they (Hensley and passenger) just saw me at the 800 block of Madison and took off. The dispatcher confirmed that they have nothing local on either one (Hensley or passenger) and upon further inquiry by an officer regarding the flyer on Hensley about a week ago, the dispatcher contacted the Cincinnati Police records department. The dispatcher was unable to obtain any information from the Cincinnati department. The conversations between the police officers reveal knowledge on their part concerning the flyer on Hensley.

CONCLUSIONS OF LAW

For an investigatory stop to be lawful, it must have been based on "specific and articulable facts which taken together with rational inferences from those facts

> time, either the search must be made immediately without a warrant, or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.
>
> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

It is recommended that the motion of the Defendant Hensley to suppress all evidence be OVERRULED.

/s/ J. Gregory Wehrman

J. GREGORY WEHRMAN
United States Magistrate

Done at Covington, Kentucky, this 22nd day of September, 1982.

Dist: James Arehart, Assistant U.S. Attorney
Edward Dressen, Esq.

reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, at p. 21. Cope acted on the basis of a radio request for information by Officer Eger on the Cincinnati flyer concerning Hensley's connection with a robbery. Officer Cope also recalled hearing about this flyer at roll call two weeks earlier, and also recalled reading the flyer personally. He acted upon timely information of suspected criminal activity by Hensley. See *U.S.* v. *Hall*, 557 F.2d 1114 (5th Cir.), cert. denied 434 U.S. 907.

There was probable cause to stop Hensley's vehicle based upon the flyer information available to Cope. Officer Raabe's observation of the weapon in plain view which he discovered from outside of the vehicle justified him in seizing that weapon immediately. *U.S.* v. *Hare*, 589 F.2d 1291 (6th Cir.) Having discovered one gun located under the passenger seat, the officers were justified in conducting a further search of the vehicle for any weapons in areas which would be easily accessible to the defendants. *U.S.* v. *Wilkerson*, 589 F.2d 621 (D.C. Cir. 1978).

The Supreme Court has sanctioned the conduct of police officers in ordering a driver out of his lawfully stopped vehicle. *Pennsylvania* v *Nimms*, 434 U.S. 106, 111 (1977) Since none of the police officers had reason to believe that either Hensley or his passenger were carrying contraband or evidence of a crime, the ensuing circumstance of locating a loaded weapon on the floor of the Hensley vehicle gave the officers probable cause as stated in *Chambers* v. *Maroney*, 399 U.S. 42 (1970):

> The circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll [v. United States, 267 U.S. 132 (1925)] and the case before us now, if an effective search is to be made at any

RESPONDENT'S

BRIEF

No. 83-1330

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. HENSLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COURT INDEX PRESS, INC. — 26 E. Ninth Street, Cincinnati, Ohio 4520 — (513) 241-450

QUESTIONS PRESENTED

I. Whether the Covington, Kentucky Police Department possessed the required probable cause to arrest the respondent when respondent committed no traffic violations but was arrested based on a "flyer" issued six days earlier by the St. Bernard, Ohio Police Department.

II. Whether Janie Hansford's handwritten statement was sufficient enough to arrest the respondent when she lacked the prerequisites for being a credible and reliable informant.

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1330

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. HENSLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

The respondent respectfully prays that the Petition For Writ of Certiorari be denied.

OPINION BELOW
JURISDICTION CONSTITUTIONAL PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above have been presented by the petitioners to the satisfaction of the respondent.

STATEMENT

On August 11, 1982, the respondent, Thomas J. Hensley, was indicted jointly with co-defendant, Albert Raymond Green, by a federal grand jury of the United States District Court for the Eastern District of Kentucky, charging each of them with possession of a firearm by a convicted felon, a violation of 18 U.S.C. App. 1202 (a) (1).

An evidentiary hearing was held on September 21, 1982, before a United States Magistrate relative to a motion to suppress filed by the respondent. The next day the Magistrate filed his recommended findings of facts and conclusions of law with the United States District Court.[1] On September 28, 1982, and on October 4, 1982, in response to objections filed by the respondent, Thomas J. Hensley, the United States District Court held supplemental hearings concerning the motion to suppress evidence filed by the respondent. The United States District Court Judge for the Eastern District of Kentucky ruled on October 19, 1982, overruling the respondent's motion to suppress.[2]

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[1] The United States Magistrate recommended that the respondent's motion to suppress be overruled basing his decision on *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Magistrate reasoned that Officer Cope had probable cause to stop Hensley's vehicle because he had heard about a "flyer" out of Ohio regarding Hensley a week prior to the arrest in Kentucky. Thus, the ensuing search which turned up the guns was predicated on the "plain view" doctrine according to the Magistrate, all quite legal.

[2] The United States District Court Judge affirmed the recommendations of the United States Magistrate. The District Court Judge deviated slightly from the Magistrates' conclusions of fact and law. The Judge felt the admission by Janie Hansford, which was against her own interest, and which implicated the respondent was sufficient "to constitute the specific and articulable facts needed to underly a stop" as stated in *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

On October 25, 1982, after filing a waiver of trial by jury, the respondent was tried and convicted by the United States District Court Judge. Subsequently, the respondent, Thomas J. Hensley, was sentenced to two years imprisonment.

The respondent appealed the United States District Court decision to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals reversed the lower court.[3] Upon a Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit the Solicitor General seeks a granting of said petition and reversal of the United States Court of Appeals for the Sixth Circuit's decision.

1. a. On December 10, 1981, Officer Kenneth Davis of the St. Bernard, Ohio Police Department interviewed one Janie Hansford concerning a robbery which occurred at the Moon Tavern in St. Bernard, Ohio.[4] She gave the Officer a 2½ page written statement describing her know-

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[3] The decision of the United States Court of Appeals is reported at 713 F. 2d 220. The Court quite simply reversed the lower court because the flyer issued nearly two weeks before the arrest of respondent by the Covington Police lacked generation of probable cause. The Court also reasoned that such a flyer issued two weeks prior to the stop did not create the exigent circumstances required to justify the Covington police stopping the respondent. See, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).

[4] The Solicitor General's Office erroneously believes that Ms. Hansford was involved in the robbery. In fact, she had nothing to do with the crime. She merely accompanied Alan Flesher, her boyfriend, to the Moon Tavern to have a few drinks. Mr. Flesher asked the bartender when the Tavern opened and apparently received a response. Ms. Hansford never indicated that she saw the Moon Tavern was to be robbed until 36 hours prior to it actually occurring. Furthermore, she was not indicted nor has she ever testified in any trial about the robbery.

ledge of a robbery she heard about and implicated a man named "Tommie".[5] Upon this information the St. Bernard Police Department issued a "flyer" for investigation only.[6] It is important to note that no where in the affidavit is the respondent's name listed and that over the objection of counsel the Government was permitted to testify beyond the four corners of the document.

b. Six days later and in response to the "flyer", a Covington, Kentucky police officer named Daniel Cope stopped the respondent, Thomas J. Hensley, while the latter was driving his car within the city limits of Covington, Ken-

[5] Ms. Hazelwell's statement never mentioned the name Thomas Hensley. The officer testified that she told him after she wrote the statement that "Tommie" meant Thomas Hensley.

[6] In its entirety, the flyer reads as follows:

"Wanted for Investigation only for Aggravated Robbery"

Wanted for Investigation of Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:10 a.m., is one Thomas James Hensley, M/W-1/18/44, CTL No. 11320, FSCA # 335, SS - [illegible], 5'8", 190 lbs. LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.

Officer Davis testified in the suppression hearings that he felt he had probable cause to arrest the respondent

Q. Did you feel at the time you issued that flyer that you had a basis to arrest Mr. Hensley.

A. With the statement alone.

Q. With what you — —

A. I felt like we had enough probable cause in the State of Ohio to bring him in for investigation, yes, sir.

Q. That didn't answer my question. You issued a statement

rucky.[7] The officer got out of his vehicle with his pistol drawn and ordered the respondent and his passenger, Albert Green, to get out of the car and place their hands on the trunk. Both the respondent and Albert Green complied.

Moments later a backup unit arrived containing Officer David Ramache. He too left his vehicle and proceeded to investigate. As he approached the respondent's car he looked inside the car because Green had left his door open. Upon viewing the interior of the car he saw the butt end of a gun protruding from under the passenger seat. Following this discovery, Officer Ramache proceeded to search the entire vehicle and located two more guns. The officers subsequently arrested both the respondent and Albert Green for possession of hand guns by convicted felons.

saying stop for investigation only, is that correct? You issued that did you not.

A. Yes, I did, but when we bring somebody in for investigation they are under arrest technically.
(10-4-82 Tr. 16).

[7] Officer Cope testified that he had no personal knowledge of the robbery in Ohio (10-4-82 Tr. 8). The flyer had been read to him during roll call each morning of the previous week (10-4-82 Tr. 9). Furthermore, Officer Cope testified that the flyer was the sole reason for pulling Mr. Hensley over, not a traffic violation or local warrant (10-20-82 Tr. 10).

REASONS FOR DENYING THE PETITION

The Respondent, Thomas J. Hensley, opposes the Government's Petition and asks this Court to affirm the Court of Appeals' decision that his Fourth Amendment rights had been violated.[8] In recent years this Court has redefined search and seizure rules in light of the Fourth Amendment. A decision of what is an unreasonable search or an unreasonable seizure is often complex. Such is not the case here. In essence, this is a case of competing interests. On the one hand, the Government wishes this Court to, in effect, allow police departments across the nation to arrest any citizen without probable cause. On the other hand, there is the respondent, who argues that his Fourth Amendment rights were violated by the Government because of a clearly unreasonable search and seizure.

It is the position of the respondent that the search was capricious due to the fact that there were no valid reasons for stopping or detaining the respondent or searching his motor vehicle. Such a search must have been based upon specific and articulable facts which taken together with rational inferences from those facts reasonably warranted an intrusion into the privacy of the respondent. In *United States* v. *Jones*, 619 F. 2d 494 (1980), the Court differentiated between having probable cause to detain an individual from that of mere supposition; whereas, in this

[8] The Fourth Amendment reads as follows:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

case there was no reasonable supposition and/or basis to detain the respondent on an investigative flyer.[9] It must be noted that the flyer was not a warrant for the arrest of the respondent nor was it based upon probable cause, but was solely for the purposes of detaining the respondent for investigative purposes concerning an aggravated robbery in the City of St. Bernard, Ohio.

The leading case dealing with the issue herein before this Court is *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971), wherein this Court determined that even though the actions of the officers in stopping and arresting someone were valid, such conduct by itself can be determined invalid by the lack of probable cause to have properly issued a warrant for the arrest against the party stopped. This Court in *Whiteley* related that under the Fourth Amendment probable cause requirements must be met before a warrant for either arrest or search can issue, and that if there is no probable cause, the officers who ultimately make the stop are not insulated in their actions; thus, any evidence obtained would be suppressed. *Id.* at 566. The case before this Court is exactly that issue, did the Covington Police officers have sufficient information of a specific and articulable nature which taken together with rational inferences from those facts reasonably warrant an intrusion into the privacy of the respondent.[10] It is important to note that even though the respondent was operating a motor vehicle, he did not relinquish his reasonable expectations of privacy. *Delaware* v. *Prouse*, 440

[9] See, *e.g.*, *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

[10] The Covington police officers who arrested the respondent did so based solely on the flyer out of Ohio (10-28-82 Tr. 10).

U.S. 648, 655 (1979).[11] The respondent would submit to this Court that clearly under the ruling of this Court in *Prouse*, an individual operating a motor vehicle does not lose all reasonable expectations of privacy simply because the automobile is in his use and is subject to governmental regulation. *Id.* at 662. Therefore, due to the fact the respondent had committed no traffic or motor vehicle offense, which is supported by the testimony of the officers involved, the facts were insufficient to authorize an investigative stop by the officers. An investigative stop to be lawful must have been based upon specific and articulable facts. However, in the case before this Court there were none. The affidavit upon which the St. Bernard Police relied does not comply with the law as set forth by this Court in that the testimony clearly states the St. Bernard Police requested the respondent be stopped and picked up and held for investigation only based upon the sworn affidavit of Janie Hansford, wherein she related that she had been told by another individual that Tommie, not Thomas Hensley, had been the driver of an automobile involved in an aggravated robbery at the Moon Tavern in St. Bernard, Ohio, on December 4, 1981.

Pursuant to *Spinelli* v. *United States*, 393 U.S. 410, 415 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), for such an affidavit to create probable cause which by the testimony of the officer it did not, it must be based upon reliable information and of such a nature that would inform a neutral and detached magistrate to believe probable cause existed for the issuance of a warrant.[12] How-

[11] See, *e.g.*, *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975).

[12] See, *e.g.*, *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Johnson* v. *United States*, 333 U.S. 41 (1932); *Nathanson* v. *Illinois*,

ever, the St. Bernard Police Department did not take this affidavit to an impartial or detached third party, ie: a magistrate for the issuance of a warrant, but rather, contrary to the decisions of *Aguilar*, *Spinelli* and *Donaway* v. *New York*, 442 U.S. 200 (1979), the officer relied solely upon his own involvement for the determination of possible probable cause to issue a stop for investigation only. The above captioned cases have stated quite clearly that although a reviewing Court will pay substantial deference to a judicial determination of probable cause, the Courts must still insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for the police. Furthermore, the issuance of warrants must be done by the neutral and detached magistrates instead of being issued by the officers engaged in the often competitive enterprise of ferreting out crime.

The respondent would further point out to this honorable Court that although an affidavit may be based on hearsay information, the courts have long held that such affidavits must be based upon and must set forth that the informant is a reliable and credible individual upon which a magistrate may make a finding of probable cause. *Aguilar* v. *Texas*, 378 U.S. 108; *Spinelli* v. *United States*, 393 U.S. 410. In this case, the officer's testimony was that he had not at any time used this individual in any prior cases, nor had he at any time known her prior to her assistance in this prosecution (10/6/82 Tr. 15). That further, contrary to the statements made by the government that she was an accomplice in this action, Officer Kenneth Davis testified that she was not at any time a knowing participant in any crime relating to the aggra-

335 U.S. 978 (1944); *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Jones* v. *United States*, 362 U.S. 257 (1960).

vated robbery of the Moon Tavern in St. Bernard, Ohio, nor was she or the respondent ever indicted on this charge. Therefore, due to the fact that the affidavit did not relate who Tommie was, that the affiant had no personal knowledge of any involvement of the respondent in the above alleged offense and that no neutral or detached magistrate was ever used to obtain a warrant the affidavit on its face was defective. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

The respondent would further relate to this Court the case of *Dunaway* v. *New York*, 442 U.S. 200, 214 (1979), wherein this Court determined that the picking up of an individual for purposes of investigation only was an illegal arrest and not within the guidelines of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and that anything obtained by the officers as a result of such an illegal action must be suppressed.[10] Therefore, even though the testimony of Officer Cope and Officer Davis showed their belief that an individual may be detained for upwards of 72 hours for the purposes of investigation, this Court has determined that no such law is valid and that any such action by any police agency is in violation of the Constitution. *Dunaway* v. *New York*, 442 U.S. 200, 214 (1979). Mere issuance of any flyer by the St. Bernard Police was, first of all, a direct violation of the constitutional rights of the respondent in that it was soliciting an illegal arrest by another agency other than the issuing department; and second, the respondent, whether or not any weapons or any other contraband were discovered or found during any search, was under arrest upon the stop by the Covington Police Department. Therefore, this Court must be guided by the decision in *Whiteley* v. *Warden*, 401 U.S. 560 (1971),

[10] See, e.g., *Mapp* v. *Ohio*, 30 U.S. 643 (1961).

that an issuing agency, here the St. Bernard Police Department, may not issue an illegal arrest flyer for the purposes of detaining an individual. Such police action in creating a situation that any action or conduct performed by any arresting or detaining agency, no matter how valid or innocent on their part, can not be sustained by the Courts; and thus any evidence obtained as a result of an illegal stop will be suppressed. Such conduct is contrary to the decisions of this Court and that the decision of the United States Court of Appeals for the Sixth Circuit, should be upheld.[10]

CONCLUSION

The petition for a writ of certiorari should not be granted. The Court of Appeals decision should be affirmed.

Respectfully submitted,

EDWARD G. DRENNEN
Attorney at Law
P.O. Box 276
Florence, Kentucky 41042
(606) 283-2200

[10] A final word in response to Footnote 6 of the Government's petition, it simply is without merit that the police departments in the Sixth Circuit have ceased making investigative stops based on "wanted" flyers. This type of scare tactic should not even be considered by this Court, in that it is not the issue before the Court nor does it appear anywhere in the record of this case and is a groundless statement of alleged fact.

CERTIFICATION

I hereby certify that I have this _____ day of April, 1994, mailed three copies of the foregoing brief for respondents to Hon. Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C., 20530. All parties required to be served have been served.

EDWARD G. DRENNEN

APPENDIX A

VOLUNTARY STATEMENT

DATE 12-10-81 **PLACE CCI**

Time Statement Started 1:55 p.m.

I, the undersigned, Janie Hansford, of 4233 Allendorf, being 24 years of age, born at Jacico, Tennessee, on 5/9/57, do hereby make the following statement to P.O. Kenneth Davis, he having first identified himself as a St. Bernard Police, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

On Dec. 4, 1981, Alan Pfeiffer asked me to go to the Moon Tavern with him to have a few drinks at about 1:30 a.m. At this time when we arrive I had order drinks. Alan ask a heavy set Lady who was tented bar what time they open. She said about 5:30 a.m. About 2:00 a.m. we left and went to Alan place and we spent the night. About 3 a.m. the phone ring and it was Sonny he asked Alan what time the place open he said about 5:30 a.m. I ask Alan what that was about he said his dad wants to know what time the Moon Tavern open. Sat at 1:30 a.m. Sonny told me at his house.

I have read this statement consisting of 3 page (s) and the facts contained therein are true and correct.

WITNESSES P.O. Kenneth Davis

Janie Hansford

Signature of Person giving voluntary statement

TIME STATEMENT FINISHED 5:00 p.m.
Date 12-10-81

VOLUNTARY STATEMENT

DATE 12-10-81 PLACE CCI

Time Statement Started a.m. 1:55 p.m.

I, the undersigned Janie Hansford, of 6253 Allendorf, being 24 years of age, born at Jacico, Tennessee, on 5/9/57, do hereby make the following statement to P .O. Kenneth Davis, he having first identified himself as a St. Bernard Police Officer, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

that they had had robbed the Moon Tavern and that he also show me some money that had red ink on the edge of it he said it came from the Moon tavern if I didn't think he meant it I could call and ask them. So I did the girl said they had been robby. On Mondayny Dec 7 1981 About 8 p.m. Sonny told me that when out and stold a mustang which was the car was in the Moon Tavern robby. He said Tommy was driving the car when they did the jop at the Moon tavern. Dale told also that he had set at the bar and had a drink a beer before they did the jop.

I have read this statement consisting of 3 page (s) and the facts contained therein are true and correct.

WITNESSES P.O. Kenneth Davis

Janie Handford

Signature of Person giving voluntary statement

Page 2 of 3 pages

TIME STATEMENT FINISHED 3:00 p.m.
DATE 12/10/81

VOLUNTARY STATEMENT

DATE 12/10/81 PLACE CCI

Time Statement Started a.m. 1:55 p.m.

I, the undersigned Janie Handford, of 4233 Allendorf, being 24 years of age, born at Jacico, Tennessee, on 5/9/57, do hereby make the following statement to P.O. Kenneth Davis, he having first identified himself as a St. Bernard Police Officer, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

Sonny told me the him & Lixie went in and did the job & Tommy was outside the door waiting for him. They he said Tommy & him ran & Dale went back in and did some Chismas shopping.

I have read this statement consisting of 3 page (s) and the facts contained therein are true and correct.

WITNESSES P.O. Kenneth Davis

Janie Handford

Signature of Person giving voluntary statement

TIME STATEMENT FINISHED A.M. 3:00 P.M.
Page 3 of 3 Pages
DATE 12/10/81

JOINT

APPENDIX

No. 83-1330

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 10, 1984

CERTIORARI GRANTED MAY 21, 1984

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1330

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-5669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

THOMAS J. HENSLEY, DEFENDANT-APPELLANT

APPEAL FROM EASTERN DISTRICT OF
KENTUCKY AT COVINGTON

GENERAL DOCKET
FILINGS—PROCEEDINGS

Date		
1982		
11/09	1)	Copy of notice of appeal, filed; and cause docketed
11/09	2)	Order (CJA-20) extending appointment of E.G. Drennen counsel for appellant
11/09	3)	Notice from court reporter (McClung) transcript ordered 10/25/82 estimated completion date 11/25/82 (200pgs.)
		* * * * *
11/30	6)	Notice from court reporter transcript filed in district court 11/24
12/02		Certified Record (01 vol. pleadings, 07 vol. transcript) filed
		* * * * *
12/30		Brief (7) of appellant (m-12/30)
1983		
01/25		Brief (7) of the appellee (m-1/24)
02/03		Joint Appendix (5) (m-2/01)
03/31		Cause argued by Edward Drennen for appellant, by James Arehart for appellee and

		case submitted to the Court (Before: Merritt, Martin and Porter, JJ.)
08/09	8)	Judgment of the District Court reversed (Merritt, Martin and Porter, JJ.) (COSTS NONE)
08/09		Opinion by Merritt, J.
08/19	9)	Motion: appellee for a 21 day extension in which to file petition for rehearing (m-8/18) (Ext. to 9/13 Granted, Judge Merritt, 8/23)
09/01	10)	Voucher mailed to Administrative Office for payment
09/13	11)	Petition for rehearing en banc submitted by the appellee
12/15	12)	Order denying petition for rehearing submitted by appellee (Merritt, Martin and Porter, JJ.)
12/27	13)	Mandate issued (costs none)
12/27		Opinion with mandate
1984		
02/09	14)	Letter from Sup. Ct. granting the appellee an ext. of time until 3/14/84 to file a petition for writ of certiorari
02/17	15)	Notice of filing petition for writ of certiorari (Sup. Ct. No. 83-1330) 2/10

District Court No. 82-29
Court of Appeals No. 82-5669

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THOMAS J. HENSLEY, DEFENDANT-APPELLANT

Date		Proceedings
1982		
8/11	1.	INDICTMENT returned & filed at COVINGTON.
8/11	2.	ORDER: (WOB) On Motion of the U.S. of this date warrant to be issued returnable on 8/20/82 at 9:30 A.M.—Bond set in the amt. of $10,000.00 w/surety. Copies as noted. (Warrant issued & mailed to Marshal at Lex.)
8/13	4.	Appearance Bond in the amt. of $10,000.00 W/SURETY executed and filed. Sureties—Bill & Charlene Hensley, 3039 W. 28th St., Covington, Kentucky—property.)
8/13	5.	Certification of surety on bond w/acknowledgment of Bill & Charlene Hensley executed & filed.
8/13	6.	Warrant for arrest of deft. executed on 8/12/82 w/Marshal's return and filed.
8/20	8.	CRIMINAL MINUTES—ARRAIGNMENT AND PLEA—On 8-20-82 case was called—Edward G. Drennen, II is appointed Atty. under the Criminal Justice Act; Deft. waives reading of Indictment; Deft. Pleads NOT GUILTY; Trial set for 9-27-82 at 10:00 A.M. Deft. to remain on bond. Copies as noted.
8/20	9.	ORDER (WOB): fil;ent;Court's pretrial order—Pretrial conf. set for 9-20-82 at

1:00 P.M. Trial date set for 9-27-82 at 10:00 A.M. Copies as noted.

8/20 10. FINANCIAL AFFIDAVIT CJA 23, filed.

8/20 11. CJA Appointment of Atty. Edward G. Drennen, II executed and filed.

8/24 12. Deft. THOMAS J. HENSLEY Request for Discovery, Inspection and Production, filed.

9/7 15. MOTION to suppress evidence and the fruits thereof seized by illegal search filed.

9/7 16. ORDER: (WOB) Motion to suppress is assigned to U.S. Magistrate, J. Gregory Wehrman for an evidentiary hearing as to said motion and a report and recommendation to the court for final disposition. Copies as noted.

9/9 17. ORDER: (JGW) Motion to suppress assigned for hearing on September 15, 1982 at the hour of 9:30 A.M. Copies as noted.

9/10 18. GOVERNMENT'S PRETRIAL MEMORANDUM filed.

9/13 19. MEMORANDUM in support of defendant's MOTION to Suppress filed.

9/13 20. APPLICATION of subpoenas to be issued by the Clerk at the expense of the United States filed.

9/13 21. ORDER:(WOB) Request of deft. to issue subpoenas is GRANTED—Clerk is directed to issue subpoenas for the following persons to appear on 9/17/82 at 9:30 A.M. said witnesses to be paid by the U.S.; Officer Dan Cope; Officer Terry Eager; Officer David Rassache; All radio transmissions pertaining to and leading up to the arrest of Thomas J. Hensley on 12/16/81, serve: Covington Police Dept, City County Bldg, Covington, Ky.; Transcript of hearing on motion to suppress held in Kenton Circuit Court, Third Division, Case No. 82-CR-005. Copies as noted. (Subpoenas

issued and given to U.S. Marshal at Covington.)

9/13 22. ORDER:(JGW) Due to a conflict hearing on motion to suppress set for 9/15/82 is set aside and same is reset for 9/17/82 at 9:30 A.M. Copies as noted.

9/17 24. U.S. Response to Defendant Hensley's Motion to Suppress Evidence

9/17 25. Transcript of Evidence and proceedings from Kenton Circuit Court, filed.

9/17 27. Subpoena issued on 9/13/82 for Clerk, Kenton Circuit Court w/Marshal's return—executed and filed.

9/17 28. Subpoena issued on 9/13/82 for OFFICER TERRY EAGER w/Marshal's return—executed and filed.

9/17 29. Subpoena issued on 9/13/82 for OFFICER DAN COPE w/Marshal's return executed and filed.

9/17 30. Subpoena issued on 9/13/82 for OFFICER DAVID RASSACHE w/Marshal's return—executed and filed.

9/20 31. ORDER:(JGW) Motion to suppress reset for evidentiary hearing on 9/21/82 at 1:00 P.M. Copies as noted.

9/20 33. ORDER:(WOB) On 9/20/82 at pretrial conference oral motion on behalf of the U.S. to sever deft. Hensley and deft. Green GRANTED—trial date of 9/27/82 will stand. Court was advised by counsel for deft. that if the pending motion to suppress was denied he intended to waive a trial by jury and enter a "long form plea" on behalf of deft. Hensley. Copies as noted.

9/21 34. CRIMINAL MINUTES—GENERAL: On 9/21/82 an evidentiary hearing was had—Court took motion to suppress under advisement for report and recommenda-

tion to the Court for final determination. Copies as noted.

9/22 35. RECOMMENDED FINDINGS OF FACT and CONCLUSIONS OF LAW (JGW) addressing defendant's Motion to Suppress—RECOMMENDED same be OVERRULED. Copies as noted.

9/27 36. OBJECTIONS of U.S. Magistrate's Findings filed on behalf of deft.

9/27 37. RESPONSE to objections of U.S. Magistrate's findings filed on behalf of the U.S.

9/28 39. ORDER:(WOB) 9/29/82 ent: Deft's Motion to suppress taken under advisement by the Court—ruling on same planned for 10/4/82. Court directed counsel for the U.S. to obtain a copy of the "bulletin" issued by Cincinnati Police Dept., indicate when said bulletin was issued and when it was withdrawn and whether or not Cov. Police Dept. was notified of the withdrawal date. Time period from 9/27/82 until the date of the setting of a new trial date is to be considered excludable delay pursuant to T18§3161(h)(8)(A)(B) USC. Copies as noted

9/29 40. True & accurate copy of teletype of Bulletin subject of Court's order of 9/28/82 filed.

10/4 41. CRIMINAL MINUTES—GENERAL: On 10/4/82 additional evidentiary hearing as to defendant's Motion to Suppress—same taken under advisement by the Court. Counsel for deft. given to 10/11/82 to file supplemental brief. U.S. given to 10/18/82 to respond. Copies as noted.

10/7 43. SUPPLEMENTAL MEMORANDUM filed on behalf of the defendant.

10/8 44. UNITED STATES' RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM

10/19 50. ORDER:(WOB) Court's Findings of Facts and Conclusions of law as to defendant's motion to suppress—the Court having considered all findings and the Report and Recommendation of the Magistrate said motion is DENIED. Copies as noted.

10/21 52. Transcript of proceedings of September 21, 1982 filed.

10/21 53. Transcript of proceedings of September 28, 1982 filed.

10/21 54. Transcript of proceedings of October 4, 1982 filed.

10/26 58. WAIVER OF TRIAL BY JURY (WOB): fil.ent; Deft. waives his right of trial by jury. Copies as noted.

10/25 59. CRIMINAL MINUTES-TRIAL—Introduction of evidence for plff. begun and concluded; Finding by Court Deft Guilty COUNT 1; Deft. to remain on bond. Appeal Bond set in the amount of $10,000.00 with Surety. Deft. and Surety will execute an Appeal Bond in this amount. Copies as noted.

10/26 60. JUDGMENT AND PROBATION—COMMITMENT ORDER: (WOB) fil; ent; Deft. sentenced to TWO (2) YEARS IMPRISONMENT—on Count 1. Copies as noted.

10/26 61. Court's Advice of Right to Appeal, filed.

10/26 62. NOTICE OF APPEAL, filed. Copies as noted.

10/26 63. APPEAL BOND in the amount of Ten Thousand (10,000) WITH SURETY—PROPERTY BOND—executed and filed.

10/26 64. Certification of Surety on Bond—Bill Hensley and Charlene Hensley as SURETIES, filed.

11/1 — TRANSMISSION FORM—Copy of Judgment and Order of 10/19/82—Notice of Ap-

peal with 2 copies of docket sheets mailed to 6th CCA and all counsel of record.

11/17 65. Copy of Transmission sheet from 6th Circuit Court of Appeals assigning No. 82-5669 filed.

11/29 66. TRANSCRIPT OF MOTION TO SUPPRESS of Co-Deft. Green of 10/22/82 filed

11/29 67. TRANSCRIPT OF TRIAL TO THE COURT OF 10/25/82 filed.

11/29 68. TRANSCRIPT OF SENTENCING of 10/26/82 filed.

11/30 — Certified Record Transmitted to the 6th Cir. Court of Appeals

12/23 — Corrected docket sheet of docket entries #43 thru #68 with Transmission Form to 6th Circuit Court of Appeals and all counsel of record.

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
THIRD DIVISION

No. 82 CR 25

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

THOMAS HENSLEY, DEFENDANT

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS

The foregoing case came on for hearing on Defendant's Motion to Suppress Evidence on May 13, 1982 at 9:30 A.M., before the Hon. Daniel J. Goodenough, Presiding Judge, Kenton Circuit Court, Third Division, Room 505, City-County Building, Covington, Kentucky.

APPEARANCES:

Hon. Steve Martin
City-County Building
Covington, Kentucky
Assistant Commonwealth's Attorney

Hon. Burr Travis
Florence, Kentucky
Attorney for Defendant

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[1] BY THE COURT: We are here on a suppression hearing as to whether the handguns found in the vehicle of the defendant on the date of his arrest were properly seized or not; is that correct?

BY MR. MARTIN: That's correct, Your Honor.

BY THE COURT: Are you ready to proceed, Mr. Martin?

BY MR. MARTIN: Your Honor, I am ready to proceed. My understanding is that the burden of going forward on a warrant to search is on the defendant to establish that there is no warrant, and then the burden of proof will shift to the Commonwealth.

BY MR. TRAVIS: We are prepared to go forward, Your Honor. We would like to invoke the rule at this time, Your Honor.

BY THE COURT: Sure.

* * * * *

TESTIMONY OF OFFICER DAN COPE

The witness, first being sworn, on oath, testified as follows:

DIRECT EXAMINATION BY MR. TRAVIS:

Q. 1. Officer, would you state your name, please?

A. Dan Cope.

Q. 2. And you are employed, are you not, by the Covington Police Department as an officer?

A. That's correct.

Q. 3. How long have you been so employed?

A. Almost four and a half years.

Q. 4. And during those four and a half years, what have been your duties with the Covington Police Department?

[2] A. Routine patrol, answering service calls, traffic stops, etc.

Q. 5. Officer, directing your attention, if I may, to December 16, 1981 regarding the events surrounding the defendant here today, Thomas Hensley, do you recall the events of that day, Sir?

A. I do.

Q. 6. Do you recall the event of stopping Mr. Hensley?

A. Yes, Sir.

Q. 7. Do you recall the events of the subsequent arrest of Mr. Hensley and Mr. Green?

A. That's correct.

Q. 8. Is it true, Officer, that you were on duty about one o'clock that particular day?

A. Yes, Sir.

Q. 9. And that you heard a radio transmission from another officer?

A. That's right.

Q. 10. Would that be Officer Eger?

A. Correct.

Q. 11. And did Officer Eger request a warrant check on Thomas Hensley?

A. He advised the dispatcher that he was trying to catch up with that vehicle; that he thought there was a warrant on Mr. Hensley and asked that they do a check on that. That was the radio broadcast as I recall that.

[3] Q. 12. Would you repeat that again for me, please. I didn't hear you.

A. He witnessed some sort of transaction and was trying to catch up with a white cadillac that Mr. Hensley was driving and asked the station to check it. He had heard there was a warrant. He asked them to check that. Now where he got his information I am not sure.

Q. 13. When you say that he had seen some type of transaction, is that what you think you heard?

A. Later in the broadcast, I don't remember if it was channel 1 or channel 2, traffic, he advised them that he thought he witnessed a narcotics transaction.

Q. 14. How much later was that? After the arrest, was it not, Sir?

A. I don't believe so. I don't really recall.

Q. 15. If I told you that Mr. Martin or myself could put on a tape which recorded the events that particular day, that there was no mention on that tape at all about any type of drug transaction, would you want to change your testimony, Sir?

A. I would not. I would say the transaction, the transmission would have been on channel 2 which is not recorded.

Q. 16. How many channels can you listen to at the same time?

A. Channel 1 and channel 2.

Q. 17. At the same time?

A. At the same time.

Q. 18. It is your testimony, Sir, I believe that [4] what you just said there, you heard some transmission about some type of transaction that went by?

A. As I recall it, that's correct.

Q. 19. Do you recall testifying, Sir, at a preliminary hearing for Mr. Hensley?

A. I recall the hearing.

Q. 20. Do you recall testifying at that hearing?

A. Yes, Sir.

Q. 21. You testified, didn't you?

A. I believe I did.

Q. 22. So you had some additional information about Mr. Hensley, didn't you, Officer, other than the radio transmission, you had some personal information about Mr. Hensley, didn't you, Sir?

A. I did.

Q. 23. And that personal information was based upon a flyer which had been read at roll call for about a week or two regarding an alleged request from Cincinnati Police to stop for investigation one Thomas Hensley?

A. That's correct.

Q. 24. You didn't hear about an arrest warrant, did you?

A. The flyer was stop for hold for investigation of a robbery.

Q. 25. And based upon what Officer Eger had told you and what you had heard on this recorder, and based upon your knowledge of that flyer, you then proceeded to 18th & Holman, is that correct, Sir?

[5] A. Also transmission from Officer Rashe, he advised me where he thought they might be.

Q. 26. Where did he say they'd go?

A. 1806 Holman.

Q. 27. That's where you went, isn't it?

A. That's where I went.

Q. 28. That's where Mr. Hensley resided at that time, didn't he, Sir?

A. I believe he said he did. I have no knowledge.

Q. 29. On arriving at 18th & Holman, you saw Tommie Hensley in a 1973 Cadillac, is that correct, Sir?

A. Tommie Hensley driving a white Cadillac, about a '73 model which had Ohio plates I believe.

Q. 30. And when you saw Mr. Hensley, you put your blue lights on, didn't you?

A. I made a U-turn and pulled in behind him, and turned the blue lights on.

Q. 31. Mr. Hensley pulled over immediately, didn't he, Sir?

A. He did.

Q. 32. Now, when Mr. Hensley pulled over, Mr. Hensley and a passenger who I guess we could identify as Albert Green, then got out of the car, did they not, Sir?

A. I got out of the car and Mr. Hensley opened his door, and I instructed them to stay where they were at. I allowed them to step out of the car and put their hands on the roof [6] of the car and stay there until my backup arrived.

Q. 33. Well, you removed your revolver, didn't you, Sir.

A. I did.

Q. 34. And you pointed it at them, didn't you, Sir?

A. I did not.

Q. 35. Where did you point it?

A. Straight in the air.

Q. 36. You told them to slide their hands on the roof of the car and slide down to the back window, didn't you, Sir, of the trunk?

A. As my backup arrived, that's what I had them do; that's correct.

Q. 37. Slide their hands down from the top of the car all the way down the back?

A. That's correct.

Q. 38. Now, at this time, Officer, was Mr. Hensley under arrest?

A. No.

Q. 39. Was he free to go?

A. No.

Q. 40. Was he in some type custodial situation, Sir?

A. He was being held for investigation, that's correct.

Q. 41. Being detained because of the flyer in Cincinnati which was stop for investigation purposes?

A. And for whatever Officer Eger might have wanted him for.

[7] Q. 42. Whatever Officer Eger might have wanted him for?

A. That's correct.

Q. 43. Now, the whole time that you had Mr. Hensley there until you put him under arrest, you had your gun removed, didn't you, Sir?

A. No. My gun went back in my holster when my backup arrived. I didn't until they got there.

Q. 44. So you put it back in. You waited until another unit came; is that correct?

A. That's correct.

Q. 45. And that unit was about three minutes away?

A. Something like that.

Q. 46. It got there in something like three minutes?

A. Something like that.

Q. 47. Now, was that Captain Bosse?

A. He was the first officer there, yes.

Q. 48. And almost immediately, 15 seconds or so later, another unit came?

A. Right.

Q. 49. And that was Officer Rashe, was it not, Sir?

A. Officer Brown, Officer Rashe and Rogers simultaneously.

Q. 50. Were they in the same unit, Sir.

A. No.

Q. 51. Different units?

A. Correct.

[8] Q. 52. But now we have four police vehicles on the scene?

A. Well, when Officer Rashe and Officer Brown arrived, Captain Bosse left.

Q. 53. They almost all got there at the same time?

A. Very close.

Q. 54. I believe, sir, that you testified at the preliminary hearing in this matter that you were in complete control of the situation?

A. I don't recall testifying to that, but I believe I was.

Q. 55. You inferred that you were not going to let anything happen; that's why you were in complete control?

A. That's correct.

Q. 56. So after the other officers got there, you then asked Mr. Hensley and Mr. Green to step up on the sidewalk and you asked them for some identification, didn't you, Sir?

A. That's correct.

Q. 57. And during this entire episode at this location, you had no trouble, no problems with Mr. Hensley or Mr. Green at all, did you, Sir?

A. None.

Q. 58. And some time after Officer Rashe came, he went to Mr. Hensley's vehicle and found these guns; is that correct, Sir?

A. As soon as I asked Mr. Hensley and Mr. Green to step up on the sidewalk, Officer Rashe stepped inside the [9] open passenger door. Lying in sight with the door open under the front seat was an H & R .32 caliber revolver.

Q. 59. Are you telling me you could see that gun?

A. After the door was opened and he leaned inside the car, the gun was visible, but it was not visible from the outside of the car.

Q. 60. One gun was found underneath the passenger seat; is that correct, Sir?

A. That's correct.

Q. 61. Another gun was found underneath a coat between the passenger seat and the driver's seat; is that correct?

A. Wrapped inside a leather coat.

Q. 62. And there was a third gun found in a gym bag that was closed but not zippered up.

A. The one inside the gym bag was not closed. It was standing open.

Q. 63. But you couldn't see what was in the gym bag?

A. You could see the hypodermic needles on top through the back window.

Q. 64. But you couldn't see anything else, could you?

A. You could see that there were other items. You couldn't tell what they were.

Q. 65. You found a small quantity of a controlled substance, didn't you, Sir?

A. I believe that's correct.

[10] Q. 66. Do you know what the substance was, Sir?

A. I have not seen the lab report, no?

Q. 67. Now, I believe you also testified, Sir, at the preliminary hearing in this matter that you, that Mr. Green and Mr. Hensley were under, you just indicated before that they were under a police custodial detention type situation. Isn't it also true, Sir, that any time you could have put Mr. Hensley and/or Mr. Green in the back of your cruiser, at any time?

A. Probably true if I had wanted to.

Q. 68. There were three or four cruisers there. You could have put them in any of these three or four cruisers, couldn't you, Sir?

A. That would be physically possible.

Q. 69. Now, you didn't see Mr. Hensley commit any traffic offenses, did you, Sir?

A. I did not.

Q. 70. And you or Officer Rashe didn't have any consent of any nature from Mr. Hensley or Mr. Green to go into the car, did you, Sir?

A. No, Sir.

Q. 71. And you and Officer Rashe didn't have a search warrant, did you, Sir?

A. No, Sir.

Q. 72. And you and Officer Rashe were not inventorying that particular vehicle, were you, Sir?

A. No.

Q. 73. And isn't it a fact, Sir, that the arrest of Mr. Hensley came after you were into that car? Isn't that correct, sir?

[11] A. That's correct.

Q. 74. Now, you said before that you pulled these gentlemen over on what Mr. Eger had said, and you also pulled them over on your own knowledge of this flyer for stop and investigation from Cincinnati that you had been hearing for a couple of weeks; is that correct, Sir?

A. Correct.

Q. 75. Isn't it a fact, Sir, there was no arrest warrant at all from Cincinnati?

A. I don't believe there had been one filed at that time, no.

Q. 76. There wasn't an arrest warrant in fact, was there?

A. I don't believe so.

Q. 77. Isn't it a fact, Officer, there was no traffic citation issued to Mr. Hensley?

A. You mean arising out of this?

Q. 78. Yes, Sir.

A. That's correct.

Q. 79. And what you arrested Mr. Hensley on was what you found in the vehicle that particular day?

A. Right.

Q. 80. Now, when Mr. Hensley pulled over, Sir, his car was parked at approximately the corner of Holman and Hawthorne, was it not, Sir?

A. Very close.

Q. 81. And it was not blocking traffic there, was it, Sir?

[12] A. He did not pull to the curb. The rear-end was still out in traffic.

Q. 82. Was it blocking traffic, Sir?

A. I would have towed it if I had found it sitting like that.

Q. 83. Well, you testified at the preliminary hearing, Sir, and I will refresh your memory if I can, you were asked the question at the preliminary hearing, "Where exactly was their car parked? They were against the curb in front of the church which is at the corner of Holman & Hawthorne, pulled almost directly across the street from 1808 Holman. Are you allowed to park there? No, Sir. There is a no parking zone? That is correct. Were they

blocking traffic? I don't believe so." Do you recall that testimony, Sir?

A. I do not.

Q. 84. If it's on this tape here, that would be your testimony, wouldn't it, Sir?

A. I would imagine so.

Q. 85. Additionally, Sir, I want to go back to a question I asked you before. You had said something about Officer Eger giving you a transmission about some type of transaction that occurred. Now, I am going to ask you something else that we discussed at the preliminary hearing. So you were asked the question, "Was there anything you heard during that transmission involving a drug transaction or anything of that nature?" Do you recall that question being asked?

A. Vaguely.

Q. 86. So your answer to that question was, "After they were arrested . . .

[13] BY MR. MARTIN: Object, Your Honor, at this point. He says he doesn't remember the question being asked, how can he be impeached with it.

BY THE COURT: He has to read the answer to see whether he remembers it or not.

Q. 87. "After they were arrested on these charges. Officer Eger then called me and advised me that he stopped and witnessed a drug transaction but was uncertain. But that was afterwards? Yes, Sir." Do you recall that, Sir?

A. I don't recall very little of the preliminary hearing at all. It is possible that the drug transaction statement was made to me on Channel 2 after the stop. It was all within a matter of seconds of each other. Not after the arrest. It might have been after the stop.

Q. 88. But you don't really remember now, do you?

A. As I said before I don't recall the exact order the traffic came in. It might have been all simultaneous. It came in in seconds of each other.

Q. 89. Now, Mr. Hensley's car was parked at the corner of 18th & Hawthorne, was it not, Sir?

A. Say that again.

Q. 90. The car was parked at 18th & Hawthorne?

A. Holman and Hawthorne.

Q. 91. Or Holman and Hawthorne. I am sorry. Is that correct?

A. Correct.

Q. 92. Now let me just recap, Officer, if I can [14] what you said here. You stopped Mr. Hensley based upon a radio transmission from Officer Eger and/or some things Mr. Rashe said, and information from the flyer that you had heard for about one or two weeks at roll call; is that correct?

A. Correct.

Q. 93. That you had your gun pulled on Mr. Hensley and Mr. Green until the other officers came and you felt comfortable to put it in your pocket; is that correct?

A. I put it in my holster.

BY THE COURT: If you are just recapping his testimony, you have already been through it once.

Q. 94. Do you recall the color of Mr. Hensley's car, Sir?

A. White, I believe.

Q. 95. Can you recall the color of the interior of that vehicle?

A. No, Sir, I don't. It seemed like it was a light color though.

Q. 96. You testified at the preliminary hearing it was a light color or beige or something. Would that be possible?

A. Possible. I don't really recall the color. It seems like it was light.

BY MR.TRAVIS: I have nothing further of this witness, Your Honor.

[15] CROSS EXAMINATION BY MR. MARTIN:

Q. 97. Officer Cope, a few questions. Let me ask you first on that night which I believe was December 16, 1981 or that day?

A. That's correct, that day.

Q. 98. You were on patrol. Where were you at when you first heard this conversation?

A. I believe I was I was on 19th Street when the original transmission came out.

Q. 99. And the original transmission being from whom?

A. Officer Eger.

Q. 100. And do you remember generally what he was asking at that time?

A. He had requested information on the flyer that he had heard at roll call to see if there was a warrant; that he had seen Tommie Hensley in a white Cadillac at the time and had lost him in that area of Robbins and Scott, I believe, or Robbins and Greenup Street.

Q. 101. So your understanding was that he was asking for . . .

A. Assistance in locating this vehicle.

Q. 102. Your first statement was that he wanted to know if there were any warrants out on Hensley; that he had just seen the man?

A. That's correct.

Q. 103. At that time did you remember seeing the flyer that was out at roll call a week or two prior to that?

[16] A. I did.

Q. 104. That flyer now, is that something that is read to you at roll call, or is it something that is handed out to each officer? How does that work?

A. It is read on roll call but I have a habit of going through roll call and re-reading everything myself, so I had seen it.

Q. 105. O.K. So this particular flyer was read to you at roll call?

A. Yes.

Q. 106. Do you remember specifically if it was a week or two prior to this incident on December 16th?

A. It was within two weeks. I don't recall. It was read for several days.

Q. 107. After it was read to you at roll call, did you go back through and find this particular flyer and re-read it yourself personally?

A. Yes, I had at least one of the days.

Q. 108. Is that an unusual thing to have a flyer read to you at roll call or any time during the day?

A. No, Sir.

Q. 109. Do you get them from different authorities, not only Hamilton County, but you get them from the FBI and different counties in Kentucky?

A. Yes.

Q. 110. Are those type flyers, do they constitute information that you would normally rely on if you are going to recognize that there is a flyer on a particular person, do you rely [17] upon those flyers to stop that person based on that information in those flyers?

A. That would be routine.

Q. 111. Are they, for the most part, I will ask you this, are they almost always reliable in that the warrant does exist?

BY MR. TRAVIS: Objection.

BY THE COURT: For the purpose of this hearing, I am going to take the evidence.

A. For the most part it has been my experience, they have been reliable.

Q. 112. Once you stop someone there is in fact a warrant for that person based on that flyer; is that right?

A. That's correct.

Q. 113. Now, you don't really know from your personal knowledge whether or not there was a warrant in Hamilton County at that time, did you?

A. No, I didn't.

Q. 114. You were basing your actions on this flyer that was handed to you at roll call?

A. That's correct.

Q. 115. Do you remember who read the flyer to you at roll call?

A. It would be Sgt. Ballinger or Sgt. Trenkamp. They probably both had at one time.

Q. 116. On this day, December 16th when you heard the transmission asking for a warrant, this rang a bell in your mind, did it not, the flyer on Tommie Hensley?

A. Yes, Sir, it did.

[18] Q. 117. Did you also hear Dave Rashe, Patrolman Rashe also speak to the warrant, mention the warrant that he had heard on the robbery in Hamilton County?

A. He mentioned a flyer over there.

Q. 118. What did you do at that time? Did you proceed to the area that Dave Rashe had said they may wind up at, 1806 Holman?

A. That's correct. I was headed that way when he came on the air and then gave two locations. 1806 Holman was one of those locations.

Q. 119. Do you remember the other location?

A. No, Sir, I do not. It was uptown someplace.

Q. 120. You testified that when you got to the car you raised your gun and placed it in the air; is that right?

A. Right.

Q. 121. Waiting for your backup unit. You told Mr. Hensley and a fellow named Al Green to step out of the white El Dorado; is that right?

A. That's correct.

Q. 122. Did you ask them anything at all; did you ask them for identification at that point?

A. At that point all I had them do was put their hands on top of the car and wait until I saw another car coming, another cruiser.

Q. 123. After Officer Rashe arrived, did you then place your gun back in your holster?

A. That's correct.

[19] Q. 124. You never pointed it at them at all, did you?

A. No.

Q. 125. Describe again, if you could, the events after Officer Rashe arrived and the location of the first .32.

A. Officer Rashe arrived and we patted each man down to make sure he didn't have a weapon on him. I then moved to the sidewalk and asked them for identification. While I was doing that, Officer Rashe stepped to the side just to my left inside the open door on the passenger side of the automobile and leaned in, and when he leaned in the butt of the .32 caliber Harrington-Richardson .32 caliber revolver came in sight.

Q. 126. O.K. Now, you saw him lean into the car?

A. I did.

Q. 127. You don't know what he saw and when exactly he saw, do you?

A. At that point, no, not until he reached in and brought it out from under the seat.

Q. 128. Where were you standing when you saw him lean into the car?

A. He was here facing this way and I would be within two and a half feet. He would be to my immediate left.

Q. 129. So you were further down?

A. Toward the end of the car.

Q. 130. Toward the driver's side rear of the car?

A. Passenger side rear of the car.

Q. 131. All right. You also saw him then pull the gun out of the car; right?

[20] A. Right.

Q. 132. Did you then proceed to search the rest of the car?

A. At that point we secured that weapon, moved them away from the car, looked in the back window and saw the hypodermic needles and the gym bag. Then we went into the automobile.

Q. 133. Was that gym bag, was it on, by the rear window or was it in the rear seat?

A. It was in the rear seat.

Q. 134. Did you place Mr. Hensley and Mr. Green into the cruiser at that time?

A. I believe they were arrested and placed in the cruiser after we found the second weapon.

Q. 135. After what please?

A. After we found the second weapon.

Q. 136. What else did you find in the car, do you remember?

A. There was three pistols altogether, two colts, one short barrel, one long barrel and one H & R .32.

Q. 137. Any live rounds with those guns?

A. All guns were loaded with live rounds, yes, sir. A package of hypodermic needles, a small amount of a controlled substance, several stocking masks, a change of clothes, change of shoes.

Q. 138. Were they wearing—what were they wearing when you stopped them?

A. Sports clothes, street clothes, I don't—

[21] Q. 139. Did they have leather jackets on at that time?

A. Mr. Green was wearing a leather jacket. The other jacket I took to be Mr. Hensley's was lying beneath the front seat.

Q. 140. Did you lift that jacket up during your search?

A. We did that when we found the second pistol.

Q. 141. Where was the third pistol?

A. The third pistol was inside the gym bag.

Q. 142. Where the hypodermic needles were?

A. That's correct.

Q. 143. At that time you were operating under the impression that this flyer that these men were indeed wanted in Hamilton County on a robbery investigation; is that right?

A. That's correct.

Q. 144. Mr. Hensley and Mr. Green did identify themselves at one point, didn't they?

A. They did.

Q. 145. How did that come about? After you had already searched the car, did you seek information on them?

A. No. I was seeking information on them when Officer Rashe found the first pistol. I believe I already had Mr. Hensley's I.D. and I don't believe Mr. Green had any on him.

Q. 146. But you did not place them under arrest until after you searched the entire car; is that right?

A. Until after we found the second pistol.

[22] Q. 147. You did not ask for any permission to search the car?

A. I did not.

Q. 148. Now, when you secure the guns, how do you do that? Do you mark it in a way so that you can identify it later, or how did you do it?

A. On the street by securing the gun and unloading, putting it where it wouldn't be taken.

Q. 149. Was there anything unusual about any of these guns?

A. The second gun was a short barrel .38 revolver, the serial number had been ground away.

Q. 150. Where was the serial number? On the butt of the pistol?

A. Under the yoke inside the cylinder.

Q. 151. That was the gun found between the two front seats?

A. That's correct.

Q. 152. Was there anything else in the car at all other than the clothing and the things that you have described?

A. I don't believe so.

BY MR. MARTIN: I don't have any further questions at this time.

REDIRECT EXAMINATION BY MR. TRAVIS:

Q. 153. Officer Cope, the flyer that you had seen personally and had heard for one or two weeks at roll call was for a stop and investigation only? Correct?

[23] A. Stop and hold for investigation of a robbery.

Q. 154. From the State of Ohio?

A. Correct.

Q. 155. Sir, you testified, I believe, that you have been on the police force four years and Mr. Martin asked you a question about the reliability of flyers. How many people within a four year time have been arrested personally on the basis of a flyer?

A. I have no idea.

Q. 156. Can you give me an estimate?

A. No, Sir, I would have to go back and check all the records.

Q. 157. Would you say more than five?

A. Quite possibly. I really don't know.

Q. 158. And most of those flyers or all of those flyers were for warrants of arrest, were they not, flyers for arrest warrant?

A. You get them both ways. I know I wouldn't know which would be more prevalent.

Q. 159. Now, when you talk about Mr. Rashe going into the car, what gun did he find first?

A. The Harrington and Richardson .32 caliber revolver under the right front seat.

Q. 160. And you couldn't see that gun from where you were, could you, Sir?

A. No, Sir.

[24] Q. 161. But as Officer Rashe got in the car and leaned in, and then he saw the gun; is that correct?

A. He stepped inside the open door and leaned down and it became visible.

Q. 162. And it became visible. So what gun did he find second, Sir?

A. That would be the short barreled .38 caliber Colt.

Q. 163. That was underneath the coat?

A. Under the coat.

Q. 164. Then it is your testimony that you put Mr. Hensley and Mr. Green in the cruiser at that time?

A. Arrested them, I believe, yes.

Q. 165. Then you went back in or somebody went back in.

A. I went back and retrieved the gym bag. I retrieved the gym bag out of the back seat I believe at the time.

Q. 166. And you are saying that you could see the gym bag through the back window of this vehicle?

A. Yes, Sir.

Q. 167. Was that a convertible, the car?

A. I don't recall.

Q. 168. And you are saying, you are talking about the back window. You mean the back window of the car, where the back windows are in the car?

A. You could see from the very back window and you could see the gym bag from everywhere. When you got up and looked through the back windows is when the hypodermic needles became visible.

[25] Q. 169. Then you are saying that window was clear and visible and you could see the gym bag?

A. Clear and visible enough to see the gym bag, yes.

Q. 170. You don't recall whether that was a convertible car or not?

A. No, Sir, I don't.

BY MR. TRAVIS: Nothing further.

RECROSS EXAMINATION BY MR. MARTIN:

Q. 171. One more question, Officer Cope. When you stopped this white El Dorado with Tommie Hensley in it, you were not stopping him acting on a warrant to arrest him; is that right?

A. That's correct.

Q. 172. You were stopping him because you were advised that he was wanted for investigation of a robbery?

A. That and Officer Eger, whatever he had.

Q. 173. Basically all he had told you up to then was that he saw them and they sped away from him; is that right?

A. Yes.

BY MR. TRAVIS: Objection. He didn't say that.

BY MR. MARTIN: I am on cross examination, Your Honor, is the only thing I would say at this point.

BY THE COURT: He is still your witness.

BY MR. MARTIN: He is not though. I didn't call him, but I will take the Court's ruling. I don't have any other questions.

BY THE COURT: May the witness be excused?

[26] BY MR. MARTIN: No, Your Honor.

BY THE COURT: Call your next witness.

* * * * *

TESTIMONY OF OFFICER DAVID RASHE

The witness, first being sworn, on oath, testified as follows:

DIRECT EXAMINATION BY MR. TRAVIS:

Q. 1. Would you state your name, please, Officer?

A. Specialist David Rashe, Covington Police Department.

Q. 2. How long have you been with the Covington Police Department?

A. Ten and a half years.

Q. 3. Sir, directing your attention, if I may to December 16, 1981, about one o'clock, do you recall the events involving the arrest of Thomas Hensley sitting to my right?

A. Yes, Sir, I do.

Q. 4. Sir, if I may, you came upon the scene there and Officer Kirk had Mr. Hensley and Mr. Green at gunpoint out of the car, didn't he, Sir?

A. Would you rephrase the officer's name.

Q. 5. Officer Cope?

A. Yes, Sir.

Q. 6. They were outside the car?

A. Yes, Sir.

Q. 7. Could you tell me where Mr. Hensley and Mr. Green were at that point when you arrived?

A. I believe Mr. Hensley was when I arrived was still in the car, or correction was on the outside of the car [27] near the driver's side at the back and Mr. Green was standing right by the passenger door.

Q. 8. O.K. Where did they go next?

A. I believe they were held at that position until we moved in, and they were brought around together to the side of the car, the passenger side of the car together towards the rear.

Q. 9. Were they patted down at that juncture?

A. I believe they were, Yes, Sir.

Q. 10. Who patted them down?

A. I don't recall.

Q. 11. Did you pat them down?

A. No, Sir, I don't think I did.

Q. 12. Did Mr. Cope have his gun out at that point, Sir?

A. Yes, Sir, he did.

Q. 13. So, was Captain Bosse there when you got there?

A. No, Sir, he wasn't. He arrived later.

Q. 14. When did Officer Brown get there?

A. Immediately after I did.

Q. 15. Did Captain Bosse leave?

A. Yes, Sir.

Q. 16. But to your recollection he was definitely not there when you arrived?

A. Not that I recall, No, Sir.

Q. 17. So we got, at one time we have Officer Cope there, we have Captain Bosse there, you, and Officer Brown?

A. Yes, Sir.

[28] Q. 18. All in separate cruisers?

A. Yes, Sir.

Q. 19. Now, you were the officer, Sir, were you not, that searched this particular vehicle?

A. Myself and Officer Cope, yes.

Q. 20. Now, if you could, tell us the circumstances when you got to the car exactly what you did, Sir?

A. Both subjects were standing outside the car. You could look right into the car, the passenger side of the seat there, below the seat, underneath the seat, the butt of the gun was protruding out.

Q. 21. Now, Officer Cope said that you leaned in then the gun became visible, and then . . .

BY MR. MARTIN: Objection. He did not say that. I asked him, Your Honor, if you could not see what Mr. Rashe had seen at that point, you just noticed he leaned over and picked that gun up. That's not the testimony.

BY MR. TRAVIS: His words were it became visible.

BY THE COURT: He said it both ways, gentlemen. Go ahead.

Q. 22. Which gun did you find first, Sir?

A. The one that was underneath the front seat, the passenger side front seat.

Q. 23. Are you sure about that?

A. Yes, Sir, positive.

Q. 24. Which gun did you find second?

[29] A. The one underneath the leather jacket on the seat in the front.

Q. 25. And that gun was completely covered by the leather jacket, was it not, Sir?

A. Yes, Sir, it was.

Q. 26. Now, were you the officer that also found the gun in the gym bag or was that Officer Cope?

A. I believe it was found by Officer Cope.

Q. 27. Now, when that gun was found Mr. Green and Mr. Hensley were already in the cruiser, were they not, or do you recall?

A. Yes, Sir, they were, I believe so.

Q. 28. You also found a small quantity of drugs in the gym bag, didn't you, Sir?

A. A very small quantity, Yes, Sir.

Q. 29. Now, when you went into that vehicle, you had no warrant, did you, Sir?

A. No, Sir.

Q. 30. No search warrant?

A. No, Sir.

Q. 31. Didn't have the permission of Mr. Green or Mr. Hensley, did you?

A. No, Sir, they didn't make any statements.

Q. 32. And isn't it a fact, Sir, they only became arrested based on what you found in that vehicle?

A. That's correct.

Q. 33. Are you aware that we are talking back in December. I believe that you were, you gave a radio transmission [30] during the series of events that led to the arrest; is that correct, Sir?

A. That's correct.

Q. 34. Do you recall exactly what you said on the radio transmission?

A. I was advised by another officer that they were, he had seen these two subjects in the car in the area of 8th Street, and at which time I got on the radio and advised there was possibly a warrant or a flyer from Cincinnati for a robbery.

Q. 35. What else did you say if you recall?

A. Well, at this time I advised other officers that they might, what direction they might be going in, where they might be headed, either the Trevor Street or the Holman Street address.

Q. 36. Did you give the address on Holman Street?

A. Yes, Sir, I did.

Q. 37. Did you know that's where Mr. Hensley resided some of the time?

A. Yes, Sir, I did.

Q. 38. And you knew about this flyer on roll call, did you not, Sir?

A. That's right.

Q. 39. And how long did you know about that flyer on roll call?

A. A few days.

Q. 40. Isn't it a duty of yours, Sir, when you know where someone is and you heard about a flyer for stop for investigation in Cincinnati, just go pick them up or do something?

[31] A. I had been looking for him.

Q. 41. You had been looking for him?
A. Yes, Sir.
Q. 42. How many times had you been at that address?
A. I hadn't been at that address. I had been by there.
Q. 43. Did you know the type of car Mr. Hensley drove?
A. He drives several cars.
Q. 44. Did you know that he drove, and/or owned a 1973 Cadillac El Dorado?
A. Yes, Sir.
Q. 45. You knew that?
A. Yes, Sir.
Q. 46. You also know, don't you sir, there was in fact no arrest warrant from Cincinnati at that particular time in regard to Mr. Hensley or Mr. Green, was there, Sir?
A. No, Sir, there wasn't.
BY MR. TRAVIS: That's my questions.

CROSS EXAMINATION BY MR. MARTIN:

Q. 47. December 16 you were in your cruiser and you heard—correct me if I am wrong—you heard a broadcast from Officer Eger stating that he had just seen Tommie Hensley; is that right?
A. Yes, Sir.
[32] Q. 48. Do you remember what else he said at that time?
A. He had thought there was a drug transaction take place on 8th Street.
Q. 49. Did he ask about any warrants that would be outstanding on—he was actually calling back to the Covington Police Department, wasn't he?
A. Yes, Sir, he was.
Q. 50. Now, did you hear that broadcast back to the police department and interject?
A. Yes, Sir, at that time I did.
Q. 51. Do you remember what you said?
A. I stated that at roll call I advised them there was possibly a flyer or a warrant out of Cincinnati for robbery.
Q. 52. At that time that was the basis of your information. You did not know one way or another whether or not there was a warrant at that point, did you?

A. No, Sir, I didn't.
Q. 53. Did you get any response back over the radio as to the flyer?
A. I don't recall if we did or not.
Q. 54. Officer Cope also came into those communications, did he not?
A. Yes, Sir, he did.
Q. 55. Did he mention anything about a warrant or a flyer from Hamilton County?
A. He had remembered hearing something about it also.
[33] Q. 56. When did you first hear about that warrant? I know you said a couple of days?
A. I believe five or six days, maybe a week.
Q. 57. And when did you hear about it?
A. Read to us at roll call.
Q. 58. And when is roll call? Morning?
A. Well, that particular day I believe it was in the morning.
Q. 59. Whenever your shift starts?
A. Yes, Sir.
Q. 60. Did you also see the flyer yourself?
A. I saw it. It wasn't exactly a flyer. It was a print-out on a teletype.
Q. 61. That's in fact the type equipment that they use in Cincinnati?
A. Yes, Sir.
Q. 62. Have you ever dealt with flyers like that before in the past?
A. Yes, Sir, I have.
Q. 63. Have you dealt with different authorities other than Cincinnati, dealt with counties in this particular state?
A. Yes, Sir, I have.
Q. 64. Federal authorities, have you dealt with the FBI?
A. Yes, Sir.
Q. 65. Have you found them to be reliable in the past in that there is in fact a warrant of some type?
A. Yes, Sir, I have.

[34] Q. 66. So you were going on that information when you went to this car; is that right?

A. Yes, Sir.

Q. 67. Now, there is no question that you knew Al Green and Tommie Hensley prior to this date is there? You knew of them?

A. Yes, Sir.

Q. 68. What did you do? Did you proceed to where you thought they would wind up, 1806 Holman or Trevor Street?

A. I was a good distance away at the time. Officer Cope was a little closer to the Holman Street address. I advised him to head that way and I would be there very shortly.

Q. 69. When you got there, Mr. Green and Mr. Hensley were already out of the car; is that right?

A. Yes, sir.

Q. 70. What did you do when you went up there? Did you walk over to the car?

A. Yes, Sir, I did.

Q. 71. Was the passenger door open at that time?

A. Yes, Sir, it was.

Q. 72. Describe to me in your own words how you saw whatever part of that gun you saw?

A. I was standing at the passenger door, looked straight down from where I was standing, saw the butt of the gun sticking out from underneath the passenger seat.

Q. 73. How much did you see of the gun?

A. About that much of it.

[35] Q. 74. Do you know what color it was? Was it a woodgrain?

A. A black-handled gun.

Q. 75. Did you first bend over and look inside underneath the seat to find the gun or did you see it first?

A. I saw it immediately as I looked.

Q. 76. Now, Officer Cope doesn't know when you saw that gun?

A. No, Sir, he doesn't. He was behind me. His attention was towards the two gentlemen.

Q. 77. He may have seen you lean over and pick it up, but he doesn't know when you saw it because he is not you?

A. That's correct.

Q. 78. When you saw the gun, did you in fact pull it out from underneath the seat?

A. Yes, Sir.

Q. 79. Was there anything unusual about that gun?

A. I believe it had some black tape around the handle.

Q. 80. This was not the weapon that was defaced?

A. That's correct.

Q. 81. What did you do at that time?

A. I placed, we placed the passenger under arrest for carrying a concealed weapon.

Q. 82. Who was that?

A. Albert Green.

Q. 83. Did you also arrest Mr. Hensley at that time?

[36] A. No, Sir, we didn't. Began a further search and found another gun on the front seat at which point we arrested Mr. Hensley.

Q. 84. Was that front seat a bucket seat?

A. I believe it was a split seat. I don't recall.

Q. 85. The second gun you found was what kind of a weapon?

A. I believe that was a .38.

Q. 86. A .38?

A. Yes.

Q. 87. Where exactly was it at when you found it?

A. On the front seat in the middle of the seat underneath a black leather jacket.

Q. 88. Did you check anything else in the car? Did you search the rest of the inside of the car?

A. I did search the rest of the front seat, the driver's side and the glove compartment.

Q. 89. After you find a gun like that, why would you search the car, any particular reasons?

A. For other weapons.

Q. 90. Was it because of what you were stopping these people for in the first place in dealing with the robbery that once you found the gun you began searching the car based on that belief of yours?

A. Yes, Sir, it was.

Q. 91. And even though you may know now that there is no warrant in Hamilton County, you didn't know that at the time?

[37] A. No, Sir, I didn't.

Q. 92. You were not stopping to arrest them on the Hamilton County warrant, were you?

BY MR. TRAVIS: Objection. He didn't stop them and I don't think he arrested them either.

Q. 93. When you got there, you were not going there to arrest them on the warrant from Hamilton County, were you?

A. I didn't hear you.

Q. 94. O.K. I am sorry. I am having trouble speaking, a little problem. Let me see if I can rephrase it and make some sense. The warrant from Hamilton County was that they were wanted or something like that on a robbery for investigation; is that right?

A. Yes, Sir.

Q. 95. You weren't going there to execute a Hamilton County warrant, were you?

A. I was going there to back up Officer Cope.

Q. 96. After he had already stopped them?

A. Right.

Q. 97. There was one other gun found, was there not?

A. Yes, Sir, there was.

Q. 98. Where was that gun found?

A. In a gym bag in the back seat.

Q. 99. Did you see anything else unusual about the gym bag prior to—

A. It was open and there was hypodermic syringes sticking out of the bag in plain view.

Q. 100. Did you see that or did Officer Cope see that first?

[38] A. He saw that.

Q. 101. He actually searched that bag, did he not?

A. Yes, Sir.

Q. 102. What else did you find in the car, the inside of the car?

A. Ski mask and tennis shoes, and I believe a small quantity of drugs.

Q. 103. When did you place Tommie Hensley under arrest if you did in fact?

A. After we found the gun underneath the leather jacket which belonged to him.

Q. 104. He made no statements at all during this time, did he?

A. No, Sir.

Q. 105. What did you place him under arrest for?

A. Carrying a concealed weapon.

Q. 106. What happened after you placed them under arrest? Did you bring them to the Covington Police Department?

A. Yes, Sir, we did.

Q. 107. What did you do with the car?

A. I had it brought there also.

BY MR. MARTIN: I don't have any further questions.

REDIRECT EXAMINATION BY MR. TRAVIS:

Q. 108. When you got to 1806 or the 1800 block of Holman, where was Officer Cope's car?

A. I believe it was parked at Hawthorne and Holman.

[39] Q. 109. Was it in the middle of the street or behind Mr. Hensley's car; do you recall?

A. In front of it, I believe.

Q. 110. Parked on the street or kind of in the middle of the street?

A. Hawthorne and Holman. I didn't pay too much attention exactly where his car was. I was concerned with the people in the car.

Q. 111. Do you recall where Mr. Hensley's car was parked, Sir?

A. Yes, Sir, I do.

Q. 112. Where was it parked?

A. On the street near the curb just across from 1806 Holman. I don't recall the exact number of the address. It was parked along in there.

Q. 113. And that car was not blocking anybody, was it, Officer?

A. It was maybe a foot from the curb. It wasn't a traffic obstruction.

Q. 114. No traffic obstruction?

A. No, Sir.

Q. 115. Do you recall, Sir, talking with me after Mr. Hensley was arrested regarding the finding of these particular vehicles?

A. No, Sir, I don't.

Q. 116. You don't recall that at all?

A. I talked to you several times. I don't recall that.

[40] Q. 117. You don't recall telling me the events of the situation when you found those guns?

A. No, Sir, I don't.

Q. 118. You don't recall mentioning anything about the gun not being in plain view you found underneath the seat?

A. No, Sir, I don't.

Q. 119. That would be my mistake then?

A. I may have. I don't remember. I don't recall.

Q. 120. Do you recall whether or not, I believe you testified this car had a spit seat in it. You mean a bucket seat kind of thing?

A. I think it had an arm rest. I don't know if it was a split seat or not. I believe it did have an arm rest that came down. I believe they do call that a split seat when they have an arm rest.

Q. 121. Do you know what a bench seat is?

A. I vaguely do.

Q. 122. One seat that goes all the way across?

A. Yes, Sir.

Q. 123. Are you sure this car did not have one of those types of seats that went straight across with no arm rest with no split at all?

A. I am not positive, no.

Q. 124. If Officer Cope said he saw you lean in that particular car, then retrieve that gun, would that be an inaccurate statement, Sir?

A. I did lean in after I observed it from a standing position.

[41] Q. 125. How long have you known Mr. Hensley?

A. Nine or ten years.

Q. 126. Do you see him all the time?

A. Not all the time. I see him on occasion.

Q. 127. Now, Mr. Martin asked you about the reliability of flyers, etc. Have you received any flyers specifically related to the City of Cincinnati in ten and a half years?

A. Yes.

Q. 128. Do you recall how many you have seen, Sir?

A. No, I don't.

Q. 129. You don't really know if they are reliable or not, do you?

BY MR. MARTIN: Object, Your Honor. He has answered that I think.

BY THE COURT: Opinion.

Q. 130. Do you recall if those flyers had been for arrest warrants or for stop and investigation?

A. They have been for different incidents, for warrants and for possible investigation.

BY MR. TRAVIS: That's all we have.

RECROSS EXAMINATION BY MR. MARTIN:

Q. 131. Mr. Travis asked you how long you have known Tommie Hensley; is that right?

A. Yes, Sir.

Q. 132. You said nine or ten years?

A. Yes, Sir.

Q. 133. How do you know Tommie Hensley?

[42] A. Been involved in arrests with him before.

Q. 134. And you knew that when you went to his car, did you not?

A. Yes, Sir.

Q. 135. Did you know that he had been convicted of a felony at any time?

A. Yes, Sir, I had.

Q. 136. So when you saw that first gun, I am going to ask you what came to your mind.

BY MR. TRAVIS: Objection.

BY THE COURT: Inconsequential.

BY MR. MARTIN: I have no further questions.

BY THE COURT: Witness may be excused?

BY MR. MARTIN: No, not yet, Your Honor.

* * * * *

TESTIMONY OF OFFICER TERENCE EGER

The witness, first being sworn, on oath, testified as follows:

DIRECT EXAMINATION BY MR. TRAVIS:

Q. 1. Officer, would you state your name, please?
A. Terence Eger.
Q. 2. And what is your occupation?
A. Police Officer of the City of Covington.
Q. 3. How long have you been so employed?
A. Ten years.
Q. 4. Do you know Mr. Hensley seated to my right, Sir?
A. Yes, I do.
Q. 5. How long have you known Mr. Hensley?
[43] A. Several years. Exactly how many, I don't know.
Q. 6. Two, three, four, five?
A. Eight, nine, ten.
Q. 7. I am going to direct your attention, Sir, to December 16, 1981. Did you see Mr. Hensley somewhere on Madison Avenue that morning?
A. Yes, Sir, I did.
Q. 8. And was Mr. Hensley parked on the street on Madison Avenue?
A. He was.
Q. 9. And did you wave to him?
A. Yes, Sir, I did.
Q. 10. Did you say anything to him at that point?
A. I don't believe so.
Q. 11. You don't recall saying that you are blocking the street, you better go on?
A. That's a possibility, Yes, Sir.
Q. 12. Did you just wave to him, maybe said something?
A. I believe I slowed my car down and possibly waved and asked Tommie to move on.
Q. 13. And that's all you saw at that juncture, was it not, Sir?

A. That he was sitting in the middle of the street? He was sitting in the middle of the street. The passenger in the car was talking to someone.
Q. 14. So Mr. Hensley left at that juncture?
[44] A. Yes, Sir.
Q. 15. And you put out a radio transmission at that juncture, did you not, Sir?
A. I did.
Q. 16. Do you recall what that radio transmission was, Sir?
A. I asked if there were any warrants on Mr. Hensley.
Q. 17. Is that all you said?
A. At that point in time, Yes, Sir.
Q. 18. Were you aware at that time, Sir, of a flyer that had been issued that involved Mr. Hensley at that time when you saw him at 8th & Madison?
A. There was a flyer put out. However, I did not have that in mind at the time of my broadcast. The brochure was put out maybe a month before that happened.
Q. 19. A month or so before it happened?
A. There was Tommie and several other people in the brochure.
Q. 20. If you had wanted Mr. Hensley right then and there, you could have stopped him, could you not, Sir?
A. Oh, Yes, Sir.
Q. 21. Did you later tell Mr. Hensley that the fact if you had wanted him at that particular time, you would have stopped him there?
A. Yes, Sir.
BY MR. TRAVIS: Nothing further.

[45] CROSS EXAMINATION BY MR. MARTIN:

Q. 22. Do you recall when you made your first broadcast, do you recall making the statement generally that I just saw Tommie Hensley and Al Thomas in a white Cadillac. Are there any wanted on them. They just sped away from me.
BY MR. TRAVIS: Objection.
BY MR. MARTIN: I am asking if he recalled, Your Honor. If he didn't, that's fine.

BY MR. TRAVIS: The objection, Your Honor, is he is trying to get this officer to say something when he in fact knows it is an inaccurate statement. The tapes are going to be played here. The tapes do not reflect that

BY THE COURT: I will let him answer. Who is Al Thomas?

BY MR. MARTIN: That was the name that was used for Al Green. When the tape is played, Your Honor, that will all become clear.

BY THE COURT: Ask the question.

Q. 23. Do you remember making that statement?

A. Would you re-ask the question.

Q. 24. O.K. All I am asking you, when you made your first broadcast concerning Thomas Hensley and the other person you described as Al Thomas, do you remember making a request, are there any wanted on these two individuals I just saw at 18th & Madison and they sped away.

BY MR. TRAVIS: Objection. He has 18th & Madison in this thing.

BY THE COURT: I know it.

[46] A. I asked warrant checks. Officer Raabe came on the air and advised me he thought there was a warrant for Mr. Hensley in Cincinnati. I advised him of the location that I had seen Mr. Hensley, and at that time I turned around and responded back to the area.

Q. 25. Did you proceed to where they were eventually stopped where Mr. Hensley was sitting?

A. No, Sir, I did not.

Q. 26. O.K. Where did you go after that?

A. I was checking the area where I had seen Mr. Hensley when the other officers stopped him.

Q. 27. Were you in fact told that there was a flyer, that there was some kind of flyer out of Cincinnati?

BY MR. TRAVIS: Objection.

BY THE COURT: Later told. What is germane to this issue here?

BY MR. MARTIN: Your Honor, the tape is going to be played. The entire conversation is going to be heard by the Court.

BY THE COURT: Sure, unless you all can stipulate what is on the tape and what is not on the tape.

BY MR. MARTIN: Your Honor, we can't do that. Mr. Travis and I disagree about one statement.

BY THE COURT: Ask your question.

BY MR. MARTIN: I withdraw the question. The officer may be excused.

* * * * *

[47] **TESTIMONY OF THOMAS J. HENSLEY**

The witness, first being sworn, on oath, testified as follows:

DIRECT EXAMINATION BY MR. TRAVIS:

Q. 1. Would you state your full name, please?

A. Thomas J. Hensley.

Q. 2. What is your address?

A. 2528 Warren Street.

Q. 3. Where is that, Sir?

A. In Covington.

Q. 4. Directing your attention to December 16, 1981, was that your address on December 16, 1981?

A. I was staying at 1806 Holman.

Q. 4. Mr. Hensley, on December 16, 1981 you heard some testimony about a 1973 Cadillac. Did you own that particular vehicle on that particular occasion, Sir?

A. Yes, Sir, I did.

Q. 5. Were you driving that vehicle on December 16, 1981?

A. Yes, Sir.

Q. 6. All the personal property in that particular vehicle was property of yours?

A. Yes, Sir, it was.

Q. 7. Owned by you?

A. Right.

Q. 8. I am going to direct your attention, Sir, if I may to a gun that was apparently underneath the seat of that particular vehicle. Did you own that particular gun?

A. Yes, Sir.

[48] Q. 9. Where was that gun underneath the seat?

A. The seat has a straight seat. It's a six way seat. There is a bar runs across it, a four back up under the seat. The gun was in behind the seat. It had been there for a week.

Q. 10. And was the gun visible without leaning into the car or looking down underneath the seat?

A. No, Sir, when I got—I was standing on the sidewalk. The Officer just testified got in my car and sat down, and I think myself personally that he found the gun under the coat first.

Q. 11. Did you see him find that gun first?

A. No, when he come out he had both guns.

Q. 12. You couldn't see that gun?

A. No, you would have had to bend over and look under there. There is a bar this far back from this end of the seat for the six way seat to work. The gun was in behind that bar.

Q. 13. Now, there was some discussion about a gun that was found in a gym bag in the back seat. What kind of car is that, Mr. Hensley?

A. A 1973 El Dorado convertible, white outside and red inside.

Q. 14. Can you see in the back of that car through the back window?

A. Well, I mean, you know how convertibles sit. I don't think you can. The seats are way forward in a convertible. There is a big old hole like. I don't think that there is no possible way that you could see, but I can bring the car around.

[49] Q. 15. Going back in time a little bit. You had seen Officer Eger on Madison Avenue, had you not, Sir?

A. Yes, Sir, and I had spoke to him. I was talking to Al Thomas which was standing on the sidewalk and Albert Green was in the car with me. So Al was getting ready to hock his watch or something, right at the hock shop there.

Q. 16. Al who?

A. Thomas, and Eger came by and told me to move on out of the street. O.K. I moved on.

Q. 17. He waved at you?

A. Yes.

Q. 18. You wave at him?

A. I said, "Yes, Sir."

Q. 19. Was the gun that was between the seat completely covered by a leather jacket?

A. It was rolled up in a leather jacket.

BY MR. TRAVIS: Nothing further.

CROSS EXAMINATION BY MR. MARTIN:

Q. 20. When did you place this .32 under the passenger seat?

A. Probably a week before. I don't know. It had been there a few days, you know.

Q. 21. What did you put it underneath there for?

BY MR. TRAVIS: Objection.

BY THE COURT: Sustained. No relevancy.

BY MR. MARTIN: If I would be allowed to develop a few other questions, I am going to try to make it relevant.

[50] BY THE COURT: Tell me.

BY MR. MARTIN: I want to know if he put it under there for the purpose of concealing it and whether or not he had even got back to see if it was indeed visible after having placed it underneath there.

BY THE COURT: You can do that. You can show whether he had the opportunity at the time in question after he had rolled it up whether it was visible or not.

Q. 22. You put the gun underneath the seat, did you not?

A. Yes, Sir, I did.

Q. 23. After putting this gun underneath the seat, did you ever stand up straight next to the passenger door with the door open?

A. At this time—

Q. 24. Answer my question.

A. No, Sir, I never did.

Q. 25. So you don't know whether it was visible from standing out there?

A. Yes, Sir, I do.

Q. 26. You never stood there, Sir. How could you? Answer the question.

A. Did I stand there and look for the gun.

Q. 27. That's what I asked you, Sir?

A. No, Sir.

Q. 28. So you don't know if it was visible from when Officer Rashe came there, do you?

[51] A. Yes, Sir, I do know. It wasn't visible because I know where it was.

BY MR. MARTIN: I have no other questions, Your Honor.

BY MR. TRAVIS: I have no further questions.

BY THE COURT: Call your next.

BY MR. TRAVIS: The Officer has arrived with the tape. We would like to present the tape for what it stands for.

BY THE COURT: The transmission...

BY MR. MARTIN: Beginning with Officer Eger,Your Honor, at the time when the Cadillac was first seen. It involved Officer Eger. This is communications from Specialist Rashe, Officer Cope and Officer Mackenzie at the Covington Police Department, and the stipulation is that it is the broadcast and the tape from that transmission.

BY MR. TRAVIS: And represents what is spoken.

BY THE COURT: You mean you all can't agree what the tape says?

BY MR. MARTIN: Your Honor, it is really dispositive of what happened that afternoon.

NOTE: There was a five minute recess after which the hearing resumed.

BY MR. TRAVIS: Your Honor, our position with this tape is that it represents what it says. I think the tape will indicate that Mr. Eger's original [52] transmission indicated Mr. Hensley took off, not sped away.

BY THE COURT: You can argue the case afterwards. Do you have a script you want me to follow which will help a little bit?

BY MR. MARTIN: As far as identification of the names, it is back and forth between those four officers.

THE COURT: Can you stipulate who is transmitting?

BY MR. MARTIN: I think we did as far as Officer Eger.

BY MR. TRAVIS: The second is a female voice I believe. Officer Rashe and the fourth voice would be Officer Cope. Mackenzie would be the dispatcher.

NOTE: The following transmissions were transcribed as accurately as possible from the tape recording:

DISPATCHER: 606, Direction of travel?

MALE VOICE: Officer leaving the county building.

DISPATCHER: 161?

MALE VOICE: Answer unintelligible.

DISPATCHER: O.K.

MALE VOICE: (#1) 606.

DISPATCHER: 606.

MALE VOICE: (#1) Concerning a warrant on Tommie Hensley or Al Thomas. They just saw me at the 800 block of Madison and took off.

DISPATCHER: Yeah.

MALE VOICE: (#2) Car 12 to 606. There's supposed to be a robbery warrant out of Ohio.

[53] MALE VOICE: (#1) Got a date?

MALE VOICE: (#3) ... a robbery warrant out of Ohio for that subject.

MALE VOICE: (#1) Which one, Thomas or Hensley?

MALE VOICE: (#3) Hensley, Thomas Hensley.

DISPATCHER: 606, Direction of travel.

MALE VOICE: (#1) Proceeding down 8th Street.

DISPATCHER: 112.

MALE VOICE: (#2) 5th & Main.

DISPATCHER: 606, can you identify vehicles?

MALE VOICE: (#1) White over white Cadillac El Dorado, I believe.

MALE VOICE: (#2) Why don't I signal before I start that direction.

DISPATCHER: Ten.

MALE VOICE: (#2) They will probably go to Trevor Street or 1806 Holman.

DISPATCHER: That's it.

MALE VOICE: Transmission unintelligible.

MALE VOICE: (#1) I will signal three at Trevor and Scott.

DISPATCHER: 141.

MALE VOICE: (#1) I'm at Scott.

DISPATCHER: 141 in front of the Value City parking lot approximately the fourth row from Winston Avenue, an auto accident, no injuries.

MALE VOICE: On my way.

[54] MALE VOICE: (#2) Will you confirm the warrant?

DISPATCHER: I have nothing local on either one. I need them stopped for information to run an NCIC check.

MALE VOICE: (#2) O.K. You might check with the detective bureau. They put a flyer on Hensley on roll call about a week ago, and read it for Cincinnati robbery one.

DISPATCHER: O.K. I will see what I can check.

MALE VOICE—Crime Bureau: Crime Bureau, Det. Hanlon speaking.

DISPATCHER: If they are there, why not ... On Tommie Hensley, do you have a robbery one out of Ohio on him?

DET. HANLON: I don't know whether they did or not, Ma'am.

DISPATCHER: Who is this?

DET. HANLON: Det. Hanlon.

DISPATCHER: This is Mackenzie.

DET. HANLON: How you doing, lady?

DISPATCHER: Fine. I believe there was something put on roll call a while ago. Never mind. I will check it. O.K.

DET. HANLON: Answer unintelligible.

MALE VOICE: (#3) ...I have a white convertible Cadillac approaching me on Holman at this time. I will be checking to see the subjects, two subjects in front.

DISPATCHER: 606 a 10-4.

MALE VOICE: ...that is the car. I saw it earlier.

MALE VOICE: (#3) There is a ... 9960 Ohio auto in front of Holman and Hawthorne.

DISPATCHER: O.K. which ... locations.

MALE VOICE: 9th & Russell.

DISPATCHER: ...no way.

MALE VOICE: 10-4.

[55] DISPATCHER: 606.

MALE VOICE: ...my own car...

DISPATCHER: O.K. 112 and out. 606 location.

MALE VOICE: (#2) 121. I'm at ... and Madison, cruise that way.

DISPATCHER: O.K. Hawthorne and Holman.

MALE VOICE: O.K.

DISPATCHER: ...We had something reference to a Thomas Hensley on roll call about a week ago. I believe it was a robbery warrant from Cincinnati. Is there any way you can check on that without a date of birth on him?

FEMALE VOICE: Where are you calling from?

DISPATCHER: Covington Police Department. Isn't this Cincinnati Records?

FEMALE VOICE: Yes, it is.... Hold on.

DISPATCHER: Uh humm.

MALE VOICE: (#3) 12, I am at 15th & Holman at this time.

NOTE: There is a conversation at this point between what sounds like more than two people which is unintelligible.

DISPATCHER: Keep going 121 ... we have not confirmed the warrant as of yet. I have Cincinnati hunting for the warrant.

MALE VOICE: (#3) ... they can really screw you up.

DISPATCHER: Yes, Ma'am. 10-4. This is Covington Police Department. About a week ago, we had something reference a Tommie Hensley on roll call. We can't find it now. I believe there is a robbery warrant out of Cincinnati. Is there any way we can...

[56] FEMALE VOICE: Well, I think that maybe information, that I can transfer you downstairs and see...

DISPATCHER: Never mind, never mind, thank you.

FEMALE VOICE: Thank you.

MALE VOICE: Signal five, signal three, 16th & Holman.

DISPATCHER: 10-4, 606.

MALE VOICE: 606. I will disregard. There are enough units here.

DISPATCHER: O.K.

MALE VOICE: (#3) Barb?

DISPATCHER: 111.

MALE VOICE: (#3) Any date of birth or anything on these subjects to run them?

DISPATCHER: Not so far as date of birth, no, Sir.

MALE VOICE: (#3) Date of birth on Thomas C. Hensley of 1/18/44. Stand by for SS. I :un that 295366794, 295363794 on Hensley.

DISPATCHER: Answer unintelligible.

MALE VOICE: (#3) Run another . . . for a white El Dorado licence I gave you, subjects both under arrest.

DISPATCHER: O.K. Attention all cars paramedic and rescue unit in route 222—correction 228 Pike Street. 111 also in route.

MALE VOICE: 10-4.

MALE VGICE: Five signal four 16th.

DISPATCHER: Tell . . .

MALE VOICE: 111.

DISPATCHER: 111?

MALE VOICE: (#3) Other subject is Albert R. Green. Albert [57] R. Green, G-r-e-e-n, date of birth is 8/7/37. 8/7/37, SS of 405421488, 405421488.

DISPATCHER: Answer unintelligible.

* * * * *

BY MR. TRAVIS: Your Honor, I think we could agree that's all we need to hear at this time. That's our case and I would like to present a brief oral argument to the Court if I may.

BY THE COURT: All right.

* * * * *

BY THE COURT: For the purpose of this hearing, the Court will find as the finding of facts that the facts essentially are not in dispute. The main dispute is whether the first weapon found under the passenger seat in the front was visible by the officer without leaning into the vehicle, was visible from looking through the window or through the open door from the outside, or whether it was so pushed under the seat or so put behind this type of seat that it was anonymous. The facts really are not in dispute because of the way it came out, and it appears that there was a flyer that was known to the arresting officer even though it had been read to him or brought to his attention a couple of weeks before. That the State of Ohio wanted this defendant, Thomas Hensley stopped for the investigation of an armed robbery. That at one point the officer said, the arresting officer said that he thought the flyer said "stop and hold," but that's a point one way or the other. That this

officer did stop the vehicle being driven by this defendant, Mr. Hensley. The defendant and the passenger were removed from the [58] vehicle and were in technical custody at that time and they were not allowed to leave; there was an investigation going on. The critical fact is whether the weapon under the passenger seat could or could not be found. For the purpose of this hearing, I think the evidence is reliable, and I will hold that the weapon under the passenger seat could be seen without leaning in.

At this point, I believe, the evidence said that the passenger, Mr. Green, was arrested. At that point, the officer entered the vehicle and then found the weapon wrapped up in the leather jacket in the front in between the two front seats. At that point the defendant was arrested. After that then the rest of the car was searched, and I believe in the gym bag were some items including a third pistol, a small quantity of a controlled substance, the hypodermic needles which were visible outside of the car laying on the seat in the open gym bag on the back seat. There were also taken a stocking or ski mask, a change of clothes and shoes. The critical point of the case is going to be whether the search of the vehicle defined the second plus weapon which is the basis for Mr. Hensley's arrest for carrying a concealed weapon was a legal search or not.

Apparently the Commonwealth agrees that the first weapon under the passenger seat was the cause of Mr. Green's arrest, and I would like to review the Rawlings case to see whether it is applicable in this case. As you know the law in Kentucky up to now, my recollection has been that you cannot search until in a legal arrest unless it is in the plain view doctrine. Clearly, the second and third weapons were not in the plain view doctrine, and under Kentucky law is you must make an arrest before you are entitled to search. Then the items must be suppressed.

[59] If the Rawlings case, which is a Kentucky case, holds that if the officer had grounds to make an arrest at that point, but did not and as a technical matter made the search and found the items and then made the arrest, then the evidence would be admissible. The critical point is going to be that items that they found in the search were the basis for the arrest. I have to determine whether the officers had grounds to arrest this defendant prior to the search of the second and third weapon. If they did, then the

search is legal, but the fruits of the search were the basis for the arrest of the defendant.

For the sake of clarity, Mr. Martin, I would like to ask you now, what grounds did the officers have to make an arrest prior to the search of the vehicle, prior to the arrest and after they found the first weapon?

BY MR. MARTIN: Of Mr. Hensley?

BY THE COURT: On the arrest of Mr. Hensley. What grounds did they have for the arrest prior to the search.

BY MR. MARTIN: My statement as to explaining why they didn't arrest him immediately, I think the officers could have gotten this man for having the gun under the passenger seat. I think they could have placed him under arrest at that point. They didn't do that which I think was just giving him the benefit of the doubt. They were going to arrest Albert Green. Thomas Hensley, I think they could have arrested him for being in joint possession of that pistol underneath the seat. At that point, they placed Albert Green. They searched within ...

[60] BY THE COURT: I know what happened. I am just asking for the grounds for the arrest if there is any.

BY MR. MARTIN: But the search after the first gun was within the control of Albert Green also. In other words, after they had him under arrest, you do have the search ...

BY THE COURT: What I am pointing out, the usual case is that each defendant is subject to arrest because of something the officers saw. They don't do the technicality of saying, "You are under arrest," and putting them in cuffs and into the cruiser. They go ahead and search and find other items. Then they backtrack and arrest for the grounds they had originally. In this case, I am looking for the grounds of the arrest because the items found in the search are what he was arrested for after the search. You can't search and then arrest without means of a warrant without good cause.

BY MR. MARTIN: They were searching as to Mr. Green's reach and control, and the second gun popped up and they also concluded it was within the control.

BY THE COURT: O.K. I have dictated the findings in the record insofar as the finding of facts, and I think for the purposes of this hearing, are there any findings you all may define that I have kind of skipped by, that should be for the purpose of this hearing?

BY MR. TRAVIS: You didn't make a finding, did you, Your Honor, I do not recall that the items were in fact within somebody's reach and control. That wasn't one of the findings was it?

[61] BY THE COURT: No, I didn't.

BY MR. TRAVIS: They were out of the car. No problem.

BY THE COURT: I didn't make any express finding. The second weapon I said was found wrapped in a leather jacket between the two front seats, clearly in the reach of both of the parties in the vehicle, one of which was Mr. Hensley and Mr. Green.

BY MR. TRAVIS: If they were in the vehicle?

BY THE COURT: I thought the testimony so indicated the item under the front seat passenger seat was clearly within the grasp of Mr. Green and most probably within the wing span of Mr. Hensley.

BY MR. MARTIN: I have nothing further, Your Honor.

BY THE COURT: There is no other vital factor that we need. That's what we are down to.

BY MR. TRAVIS: Your Honor, the Court did not mention in its findings the original stop ab initio.

BY THE COURT: Fine. That's a conclusion that I would like to make that based upon the flyer information of the possible warrant for Mr. Hensley for investigation of an armed robbery, and possibly the warrant, the flyer said to detain and hold or investigate and hold, in my mind that's probable cause to stop the defendant and clarify [62] the situation, clarify whether there was actually a warrant or not, you know, because a flyer usually means a warrant and when you get into a case, sometimes it does and sometimes it doesn't, and the officer has the obligation of stopping and finding it out. The stopping then led to the other activities. I am going to hold there was probable cause for the stopping. After I review the cases you have submitted, I will probably put an order on either suppressing the evidence or overruling the motion to suppress. I have already dictated findings and conclusions in the record.

Anything else, gentlemen?

BY MR. MARTIN: No, that's all right, Your Honor.

BY THE COURT: Thank you all.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

Cov. Crim. 82-29

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT

MOTION TO SUPPRESS

The above-entitled matter came on for hearing before the Honorable J. Gregory Wehrman, Magistrate, on September 21, 1982.

APPEARANCES:

FOR THE GOVERNMENT:

James E. Arehart, Esq.
Assistant U.S. Attorney
P.O. Box 1490
Lexington, Kentucky 40591

FOR THE DEFENDANT:

Edward G. Dressen, Esq.
Attorney at Law
P.O. Box 276
Florence, Kentucky

Allen S. McClung
Court Reporter

EXAMINATION INDEX

[3] Pursuant to the call of the case by the Clerk of Courts, the following transpired:

—0—

THE COURT: Let the record show that the defendant, Thomas J. Hensley, is present in court with his attorney, Ed Drennen, and that this is a continuation of the previous hearing on the defendant's motion to suppress which was previously set for September 17th.

Mr. Drennen, to be sure the record is clear we are stipulating the transcript of evidence and proceedings in the Kenton Circuit Court, which I am now holding in my hand; correct?

MR. DRENNEN: That's correct, Your Honor.

THE COURT: Is that stipulated, Mr. Arehart?

MR. AREHART: That's correct, Your Honor.

THE COURT: Do you want to present additional witnesses?

MR. DRENNEN: Your Honor, what we would ask the Court to do is simply to avoid any [4] problems to recall for example Officer Rassache and ask him his name and whether his testimony would be substantially the same as it was in that hearing.

The only thing that we would add is the section dealing with the tapes. There are portions that the court reporter said were inaudible or wasn't sure of and we would just like to replay the tape.

It's very short and if the Court has had an opportunity to review it, it's only like four pages long—the transcript—to replay it so the Court can hear it for itself—the transmissions between the cruisers.

THE COURT: Very well. Call your first witness, Mr. Drennen.

DAVID RASSACHE, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. DRENNEN

Q. Officer, if you would, please state your name and by whom you are employed.

A. Specialist David Rassache of the Covington Police Department.

Q. Officer, did you previously testify in a suppression hearing in the Kenton Circuit Court concerning [5] the case against Thomas Hensley?

A. Yes, sir, I did.

Q. Did your testimony at that time deal with stopping Mr. Hensley on December 16th, 1981?

A. Yes, sir.

Q. Would your testimony be substantially the same today as it was at that hearing in the Kenton Circuit Court?

A. Yes, sir.

MR. DRENNEN: I have nothing further.

THE COURT: Any cross-examination, Mr. Arehart?

MR. AREHART: I have no questions.

THE COURT: (To the witness) Thank you, Officer, you may step down.

(Witness stands aside.)

THE COURT: Call your next witness, Mr. Drennen.

MR. DRENNEN: Your Honor, we call Officer Eager.

TERRY EAGER, called as a witness on behalf of the defendant, after first being duly sworn, testified as [6] follows:

DIRECT EXAMINATION—BY MR. DRENNEN

Q. Officer, would you state your name and by whom you are employed?

A. Terry Eager and I'm employed by the City of Covington.

Q. Officer, did you have an occasion to give testimony concerning a suppression hearing of Thomas J. Hensley in the Kenton Circuit Court?

A. Yes, sir, I did.

Q. Did that suppression hearing deal with the stopping of Mr. Hensley on December the 16th of 1981?

A. It did.

Q. Would your testimony today be the same as it was on the date of the suppression hearing in the Kenton Circuit Court?

A. Yes, sir, it would.

MR. DRENNEN: I have nothing further from this officer.

THE COURT: Any cross-examination, Mr. Arehart?

MR. AREHART: I have no questions, Your Honor.

THE COURT: (To the [7] witness) Thank you, Officer.

(Witness stands aside.)

MR. DRENNEN: Your Honor, there was one other officer who was here last week and his testimony was that of Officer Cope and I believe his testimony would be substantially the same as it was on the date of the suppression hearing and I don't know if the Government would want to cross-examine Officer Cope.

MR. AREHART: No, Your Honor, and in fact we offered last week to stipulate to his testimony.

THE COURT: All right. Let the record reflect that the transcript testimony of Officer Dan Cope from the Kenton Circuit Court which was held on May 13th, 1982 is stipulated.

MR. DRENNEN: Your Honor, we would call Thomas Hensley.

THOMAS J. HENSLEY, called as a witness on behalf of the defendant after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. DRENNEN

Q. Sir, would you state your full name?

A. Tommy J. Hensley.

[8] Q. Mr. Hensley, you're the defendant in this action?

A. Yes, sir.

Q. Did you also testify in a suppression hearing in the Kenton Circuit Court concerning a stopping of your vehicle, the confiscation of certain weapons at that time in December—December 16th of 1981?

A. Yes, sir.

Q. Would your testimony be the same as it was on the date of that hearing?

A. Yes, sir.

MR. DRENNEN: I have nothing further of this witness.

THE COURT: Cross-examination, Mr. Arehart?

MR. AREHART: I have no questions, Your Honor.

THE COURT: (To the witness) Thank you. You may step down.

(Witness stands aside.)

THE COURT: Call your next witness, Mr. Drennen.

MR. DRENNEN: Your Honor, the only other witness we would call would be—is [9] the tapes and Lieutenant Schonaker is here from the Covington Police and we would ask that the tapes be played for the purposes of the record.

THE COURT: All right. What page is it in the transcript that you are referring to?

MR. DRENNEN: I believe it's the last four pages of the transcript.

MR. AREHART: Your Honor, it's Page 52, 53, and 54 and parts of 55.

MR. DRENNEN: Your Honor, the only thing I might want to do is—unless the Government is willing to stipulate the authenticity of these records, is to have Lieutenant Schonaker indicate that these documents have been in his possession.

MR. AREHART: If Schonaker says they are authentic, I'll take his word for it.

MR. SCHONAKER: Your Honor, do you want an explanation as far as how this machine works and the time and what we'll be listening to?

THE COURT: Yes.

MR. SCHONAKER: Before we get started, what I've been doing is I'm going to the time in question. We have a set of numbers up here and this [10] is on military time—a 24-hour basis. So what we're seeing here is the first set of numbers on the left is your hour.

That's 1300 hours which would be 1 o'clock in the afternoon. The second set of numbers is your minutes. That's 15, so that would be 15 minutes.

The third set of numbers is your seconds. So what we're seeing—actually—it's 1:15 and 33 seconds. That's military time.

So what we want to do is we want to go to 1316.

NOTE: The following transmissions were transcribed as accurately as possible from the tape recording:

DISPATCHER: 606, Direction of travel?

MALE VOICE: Officer leaving the county building.

DISPATCHER: 161?

MALE VOICE: (Answer unintelligible.)

DISPATCHER: Okay.
[11] MALE VOICE (#1): 606.
DISPATCHER: 606.
MALE VOICE (#1): Concerning a warrant on Tommie Hensley or Al Thomas. They just saw me at the 800 block of Madison and took off.
MALE VOICE (#2): Car 12 to 606. There's supposed to be a robbery warrant out of Ohio.
MALE VOICE (#1): Repeat.
MALE VOICE (#3): There's possibly a robbery warrant out of Ohio for that subject.
MALE VOICE (#1): Which one, Thomas or Hensley?
MALE VOICE (#3): Hensley, Thomas Hensley.
DISPATCHER: 606, Direction of travel.
MALE VOICE (#1): Eastbound on 8th Street.
DISPATCHER: 112.
MALE VOICE (#2): 5th and Main.
DISPATCHER: 606, can you identify the vehicle?
[12] MALE VOICE (#1): White over white Cadillac El Dorado, I believe.
MALE VOICE (#2): Why don't I signal before I start that direction.
DISPATCHER: 10-4.
MALE VOICE (#2): They will probably go to Trevor Street or 806 Holman.
DISPATCHER: That's it.
MALE VOICE: (Transmission unintelligible.)
MALE VOICE (#1): 121, I'll signal three at Trevor and Scott.
DISPATCHER: 141.
MALE VOICE (#1): I'm at Scott.
DISPATCHER: 141 in front of the Value City parking lot approximately the fourth row from Winston Avenue, an auto accident, no injuries.
MALE VOICE: On my way.
MALE VOICE (#2): Have you confirmed the warrant?
DISPATCHER: There's nothing local on either one. I need them stopped for information to run an NCIC check.
[13] MALE VOICE (#2): Okay. You might check with the detective bureau. They put a flyer on Hensley on roll call

about a week ago or so in reference to a Cincinnati robbery one.
DISPATCHER: Okay. I'll see what I can find.
MALE VOICE: Crime Bureau, Detective Hanlon speaking.
DISPATCHER: If they are there, why not ... On Tommie Hensley, do we have a robbery warrant out of Ohio on him?
DET. HANLON: I don't know whether they did or not, Ma'am.
DISPATCHER: Who is this?
DET. HANLON: Detective Hanlon.
DISPATCHER: This is Mackenzie.
DET. HANLON: How you doing, lady?
DISPATCHER: Fine. I believe there was something put on roll call a while ago. Never mind. I will check it. Okay.
[14] DET. HANLON: Okay.
MALE VOICE (#3): I have a white convertible Cadillac approaching 18th on Holman at this time. I will be checking to see the subjects, two subjects in front.
DISPATCHER: 606 a 10-4.
MALE VOICE: That is the car. I saw it earlier.
MALE VOICE (#3): 9950 Ohio out in front of Holman and Hawthorne.
DISPATCHER: Okay, which—locations.
MALE VOICE: 9th and Russell.
DISPATCHER: Don't go 'way.
MALE VOICE: 10-4.
DISPATCHER: 606.
MALE VOICE:—my own car—
DISPATCHER: Okay. 112 and out. 606 location.
MALE VOICE (#3): 121. I'm at ... and Madison, moving that way.
[15] DISPATCHER: Okay. Hawthorne and Holman.
MALE VOICE: Okay.
DISPATCHER: This is the Covington Police Department. We had something—reference to a Thomas Hensley on roll call about a week ago. I believe it was a robbery warrant from Cincinnati. Is there any way you can check on that without a date of birth on him?

FEMALE: Where are you calling from?

DISPATCHER: Covington Police Department. Isn't this Cincinnati Records?

FEMALE VOICE: Yes, it is. Let me transfer you to 3567. Hold on.

DIAPTCHER: Uh hum.

MALE VOICE (#3): 121, I am at 15th and Holman at this time.

DISPATCHER: 10-4, 121—we have not confirmed the warrant as of yet. I have Cincinnati hunting for the warrant.

Yes, ma'am. 10-4. This is Covington Police Department. About a week ago we had something reference a Tommie Hensley on [16] roll call. We can't find it now. I believe there is a robbery warrant out of Cincinnati. Is there any way you can—

FEMALE VOICE: Well, I can't give you any information, but I can transfer you downstairs and—

DISPATCHER: Never mind, never mind, thank you.

FEMALE VOICE: Thank you.

MALE VOICE: Signal five, signal three, 16th and Holman.

DISPATCHER: 10-4, 606.

MALE VOICE: 606. I will disregard. There are enough units here.

DISPATCHER: Okay.

MALE VOICE (#3): Barb?

DISPATCHER: 111.

MALE VOICE (#3): Any date of birth or anything on these subjects to run them?

DISPATCHER: Not so far as date of birth, no, sir.

MALE VOICE (#3): Date of birth on Thomas C. Hensley of 1/18/44. Stand by for SS. I run that 295-36-6974. 295-36-6974 on Hensley.

[17]DISPATCHER: 10-4.

MALE VOICE (#3): Dispatch one wrecker for a white El Dorado, license I gave you, subjects both under arrest.

DISPATCHER: Okay. Attention all cars: Paramedic and rescue unit en route 222—correction 228 Pike Street. 111 also en route.

MALE VOICE: 10-4.

MALE VOICE: Five signal four 16th.

DISPATCHER: Tell ...

MALE VOICE: 111.

DISPATCHER: 111?

MALE VOICE (#3): Other subject is Albert R. Green, Albert R. Green, G-r-e-e-n, date of birth is 8/7/37, 8/7/37, SS of 405-42-1488, 405-42-1488.

DISPATCHER: 10-4.

MR. DRENNEN: Your Honor, that would be all that the defendant would present to the Court at this time other than arguing the case law concerning the suppression hearing.

THE COURT: All right. [18] So that the record is clear, what we have just heard on the tape is Pages 32 through 37 of the transcript from the Kenton Circuit Court.

Gentlemen, can the officers be excused?

MR. DRENNEN: Yes, Your Honor.

THE COURT: Mr. Arehart, do you have any reason to keep these officers here?

MR. AREHART: No, Your Honor.

THE COURT: Thank you, gentlemen, for coming down. Very well, gentlemen, we are finished then with the evidentiary portion of this?

MR. DRENNEN: We are from the defendant's standpoint, Your Honor.

THE COURT: Does the United States want to present anything?

MR. AREHART: I don't have any additional evidence, Your Honor. As far as listening to the tape, I think the only difference that I can see that might be of any significance at all is at the top of page 33 or rather the bottom of Page 32, the officer says there's supposed to be a warrant out of Ohio.

[19] Then over on the top of Page 32 or rather 33 it says got a date. I thought the officer said repeat instead of got a date.

Then he did repeat it and said a robbery warrant out of Ohio. If that makes any difference—he wasn't asking for a date, he was just asking for him to repeat what he had said.

THE COURT: Do you want to comment on that, Mr. Drennen?

MR. DRENNEN: No, Your Honor.

THE COURT: Very well. Do you care to make any oral argument at this time?

MR. DRENNEN: Yes, Your Honor.

THE COURT: Very well. Do you care to make any oral argument at this time?

MR. DRENNEN: Yes, Your Honor, I would. Your Honor, this will probably be substantially the same argument they made down below at the State Court concerning this same exact case in the suppression hearing in the Kenton Circuit Court.

[20] There are certain criteria that we have to arrive at under the *Rakas* case and *Salvucci* and *Rawlings*. The first question is standing.

It's undisputed that the man who owned the vehicle was Thomas Hensley. Mr. Hensley also in the testimony says that I owned all the weapons. I owned everything that was in the vehicle.

That gives him standing to object to a search under those three cases which I feel are the leading cases concerning standing in Federal Court.

MR. AREHART: Your Honor, if I might speed things up, I'm not contesting the standing of Mr. Hensley but I would take a different view on Mr. Green. But, as far as Mr. Hensley is concerned, we concede that he has standing.

MR. DRENNEN: The first question then becomes, Your Honor, whether or not any officer can stop someone for the sole purpose of stopping someone. In this particular case we would cite to the Court *Delaware v Prouse*, 99 Supreme Court, 1391 (1979).

Therein the [21] Supreme Court said that an individual simply by driving his motor vehicle does not lose his right to an expectation of privacy.

Therefore, even though he was driving a vehicle he hasn't lost that. This case also deals with the situation that officers may not just randomly stop someone. There was absolutely no traffic violation if the Court will review the

transcript—seeing that the officers saw—they saw absolutely nothing that this man had done wrong.

There was no indication that there was a flyer really outstanding. Even though they said if you'll read the transcript they finally admitted that there was no flyer. There's no flyer here today.

There was no warrant out of Cincinnati to cause them to stop this particular man. He had done nothing wrong. Therefore, they had no reason—he had committed no crime in their presence.

He had committed no traffic violation in their presence to give them reason to stop him. There was no warrant [22] existing or flyer existing to stop this man.

We then run into the situation that they do stop him with no warrant. They pull him over. He stops his car. It is not obstructing traffic. The officer says—Officer Cope says that he has the circumstances well in hand. He invites the two men out of the vehicle and draws his weapon and has them move to the rear of the vehicle.

When asked in State Court—and again his testimony would be substantially the same, he had the circumstances well in hand. There was no endangerment of the officer. There was no fear that these people could reach an arm's length or a hundred and eighty degrees in either direction and grab the supposed weapon that he felt he had to search for.

As a matter of fact, Officer Cope never even looked in the vehicle other than through the back window and saw a gym bag. The situation becomes this.

Therefore, there's no reason for a search. There was no reason for an inventory. There was no inventory on this vehicle to tow it in at the time that these people were standing [23] out on the sidewalk. These people were not under arrest, Your Honor, they were custodially detained for the purposes of some type of investigation which proved to be without merit.

These men had done nothing wrong. They were standing on the street and then on the sidewalk. They were not under arrest. They were not under arrest until Officer

Rassache said he looked in the vehicle and he saw a gun sticking out.

He then reached in. Your Honor, the situation becomes this. He arrested Green. He didn't arrest Hensley. He arrested Green and then they went back into the vehicle, searched the vehicle further and then arrested my client.

Well, if that's the sequence of events then the Government has indicted Mr. Green on the first weapon found under the seat by the transcript, then my client had committed no crime at all because they arrested Green and Mr. Green was not known as a felon.

He was Mr. Thomas and not Mr. Green. He was Al Thomas and not Al Green. So my client still hasn't committed any crime. [24] Then they go back in and they search the vehicle. The testimony from the transcript is that one gun is wrapped up in a jacket sitting there on the front seat.

That obviously is not plain view. There are two guns supposedly in a gym bag which the officer could not see. The third one was stuffed under the seat though the officer says, well, I was standing there and I could see it.

There's some discrepancy and the Court will see it between the testimony of Officer Cope and that of Officer Rassache concerning his body and what he did—whether he was bending down looking in or he was just standing there on the sidewalk.

Our position would be very simply, Your Honor, that because the vehicle was not in any way obstructing traffic, because these men were not under arrest until a weapon was found—that there was no inventory search being done—there was no purpose for them—there was no endangerment of the officers—there is no valid search.

They had no reason to stop him. They had no purpose in the car. If they wanted to search the vehicle they could have [25] arrested them for some reason and taken them in and inventoried the car.

But they didn't do that, Judge. They just simply searched the vehicle blatantly and when they found something then they arrested them.

Your Honor, our situation is simply this, that there is no legitimate reason to hold that this kind of action should be condoned by the Court—the same reason the Kenton Circuit Court didn't condone it.

We would also cite to the Court *United States* v. *Jones* which is 619 Fed. 2d 494—it's a 1980 case. Finally we even have a case that we would cite to the Court that taking the proposition that there was in fact a flyer and through some mistake in understanding they thought this flyer and it ended up that there wasn't—that case is *Whiteley* v. *Warden*, 91 Supreme Court, 1031. It's a 1971 case.

That case says that if there was in fact a flyer or warrant and that warrant proved to be defective, then this search is defective even though the officers were acting on good [26] cause at the time they made this search, it's still no good.

Based upon these things and the cases we've already cited to the Court in our memorandum concerning this particular issue, we feel that there's absolutely no basis for which the United States should be permitted to use these weapons as evidence and that all the evidence found as a result of this illegal search should be suppressed.

THE COURT: Thank you, Mr. Drennen. Mr. Arehart?

MR. AREHART: If Your Honor please, basically my position has been set out in the memorandum. The only thing that I would add on the facts—I listed seven specific facts that we felt were indicated in the transcript—that did not include that on Page 36 of the transcript the officer testified that after he arrested Green, the reason he looked into the jacket and the gym bag was for other weapons.

That was the only purpose he looked in there.

Your Honor, simply put, this is a case for the United States that would be justified under *Terry* v. *Ohio* and the other [27] cases that we have cited concerning investigative stops. The question is whether or not at the time the officer stopped this automobile he had reasonable grounds to believe that these subjects were wanted.

I think the tapes themselves back up his testimony that he thought there was a warrant. The dispatcher repeatedly said that she believed there was a warrant out of Cincinnati for this man.

She at one time requested that they stop and hold for investigation. The testimony about the flyer was to the same extent, to stop and hold for investigation concerning a robbery out of Ohio.

There was no doubt that this flyer was read at roll call. What was established later was that there was not in fact a warrant.

However, it is undisputed that the flyer was read at roll call and the officer testified that he believed based upon that—he had a reasonable belief because of police procedure that there was an outstanding warrant or else there wouldn't have been a flyer.

[28] The State Court found as we are asking this Court to find, that there was reasonable grounds to stop these people and to hold them long enough to determine whether or not there was a warrant.

You can tell from the tapes themselves that when they're getting down to the end when this dispatcher apparently is having all sorts of frustrating times trying to get through to Cincinnati and get an answer out of them, that the officers are already on the scene and had these men under arrest.

We take the position that there was reasonable grounds to stop these people and to maintain the status quo and determine whether or not there was a warrant. When they did that as the State Court found, this first gun was in plain view which gave them grounds to seize that particular weapon.

After the first gun was found in plain view and Mr. Green was placed under arrest, I think every Supreme Court case that's been decided says that once a person is under arrest they can search the whole car—containers and [29] noncontainers. I don't think it makes any difference because these arrests were in another person's car. They just can't turn their back on possible danger.

The cases I've cited to the Court specifically dealt with searching the jacket which laid on the seat. They justified that. In this particular case we have in addition to the jacket an open gym bag which easily could conceal weapons.

It's our position that these officers, number one, were justified in making the initial stop and number two, that once the weapon was seen in plain view they had a right to seize that weapon and to search the immediate area for other weapons.

THE COURT: Thank you, Mr. Arehart. I'll take this under submission. Do you have a trial date sometime soon?

MR. DRENNEN: The 27th, Your Honor.

THE COURT: All right. I'll try to get a report out by Wednesday. If there is nothing else, gentlemen, we will stand in recess.

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[30] And these were all the proceeding had and reported upon this matter on this date.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

COV. CRIM. 82-29

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT

MOTION TO SUPPRESS

The above-entitled matter came on for hearing before the Honorable William O. Bertelsman, Judge, on September 29, 1982.

APPEARANCES:

FOR THE GOVERNMENT:
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Allen S. McClung
Court Reporter

EXAMINATION INDEX

[3] Pursuant to the call of the case by the Clerk of Courts, the following transpired:

THE COURT: I'm here to hear objections to the Magistrate's report on this Suppression Hearing. I see the officers present and I will say I wish I had done this hearing myself. I didn't realize this was such a close question.

Are these the officers involved in it?

MR. AREHART: If Your Honor please, I brought them here today for the specific purpose if the Court desires to ask them any questions, you have a right to do that.

THE COURT: I would have the right to do that. Do you have any objections, Mr. Drennen?

MR. DRENNEN: No, Your Honor.

THE COURT: Let's do that. I'll tell you what I'm interested in. I just can't get the gist of it from the Magistrate's report and the transcript as to why on this particular day when they went down to stop this man, when they'd had this bulletin for two or three weeks.

[4] It's causing me some difficulty in trying to get a handle on this. As I said in hindsight I would have done the hearing myself if I had realized it was this close of a question.

Call somebody who can—I'm familiar with the basic outline of the thing. I've been over it several times. Mr. Arehart, call whatever officer can explain that the best.

I want to know where this bulletin from Cincinnati came from and what was the basis for it and why they had to stop him at this particular time.

MR. AREHART: Your Honor, the United States calls Officer Cope.

DAN COPE, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. AREHART

Q. Will you state your name, please?

A. Dan Cope.

Q. For the record what is your occupation?

A. Patrolman for the City of Covington Police Department.

Q. Officer Cope, are you the officer who made the [5] initial stop of the defendant Hensley on the date in question?

A. Yes, sir.

Q. I believe what the Court is interested in hearing here today is basically when and what information you had from the Cincinnati Police Department and your own personal knowledge of what you saw and what you heard concerning Mr. Hensley.

A. For approximately one to two weeks prior to the stop we had a flyer which is an eight by ten sheet of paper with information from the Cincinnati Detective Bureau read to us on roll call.

That information stated, stop and hold for investigation of an armed robbery Mr. Hensley and anyone else in his company; I don't recall if it named anyone else.

It stated consider subjects armed and dangerous and to hold for that division. That's read to us daily and until the date the traffic stop was made no one came in contact with Mr. Hensley. We were unable to make any stop until I received a radio traffic from Officer Eager that he had Mr. Hensley in a white Cadillac and that the Cadillac had attempted to elude him he thought.

[6] And, he was unable to relocate.

Officer Rassache and I—

THE COURT: Stop right there. Go over that again. Officer Eager, where was he?

THE WITNESS: He was at Robins and Madison in Covington.

THE COURT: What kind of transmission—where were you?

THE WITNESS: I was at 19th and Jefferson.

THE COURT: You were several blocks away. What kind of transmission—did you hear him talk to the dispatcher or did he call you directly?

THE WITNESS: He notified the dispatcher that he had seen Mr. Hensley and asked him to check on a warrant and to pull that flyer.

THE COURT: I see. Did he specifically mention the flyer?

THE WITNESS: I believe—either he or Officer Rassache did over the air but I don't recall which for certain which one mentioned the flyer right then. I was familier with the flyer.

[7] THE COURT: On this system that you have can you talk directly to the other officers or do you have to go through—do you just hear them talking to the dispatcher or what?

THE WITNESS: There are two channels, Channel 1 and Channel 2. You can hear both channels from Channel 1. Channel 2 is direct car to car and the dispatcher cannot hear it.

In other words if an officer calls and wants to switch to Channel 2 to call me and I'm on Channel 1, I would hear him and then switch to Channel 2 and answer.

That's car to car. Most of the traffic between Officer Rassache and I was on that channel—2—car to car.

THE COURT: I didn't mean to take over your examination, Mr. Arehart. Go ahead.

MR. AREHART: Well, Your Honor, obviously the Court has some questions and I think it's better that you get directly to the answers you are seeking. I could stand here all day and not ask the right question.

THE COURT: All right. [8] Maybe I'll take you up on that.

(To the witness) What did you do then? After you heard this transmission what did you do then?

THE WITNESS: I went to Channel 2 with Officer Rassache and we discussed the possible locations for the car—where the car was going. He knew of two locations that Mr. Hensley might be at.

He went to one and I went to the other. I sat about a block away and saw the car coming. I pulled out and made a U-turn at 18th and Holman and pulled in behind the vehicle and made the traffic stop.

THE COURT: What were you going to do when you stopped Mr. Hensley? What were you going to do?

THE WITNESS: Hold him waiting for the station to advise me if there was a warrant. We had been advised from Cincinnati that a warrant was forthcoming.

THE COURT: You weren't going to take him and question him there on the street?

THE WITNESS: Please?

[9] THE COURT: You were not going to take him—this is what I wasn't able to get out of the state transcript—you weren't going to take him and question him there on the street.

THE WITNESS: At that point the stop was to hold him and wait and see if there was a warrant. That was my only information at that time.

THE COURT: All right. That clears a lot up. You weren't going to question him. What were you going to do if there was no warrant?

THE WITNESS: If there had been no warrant he would have been released.

THE COURT: And if there had been you would have—

THE WITNESS: He would have been arrested.

THE COURT: All right. That clears a lot up. Do we have a copy of this bulletin from Cincinnati—this flyer bulletin?

MR. AREHART: We don't have it here. I think they've tried to locate it since—it's probably since the warrant turned out not to be in existence, it's probably disposed of.

THE COURT: Don't they [10] have one in Cincinnati that you could get?

MR. AREHART: We can try.

THE COURT: I think that would be helpful. What did that flyer say to the best of your recollection?

THE WITNESS: Stop and hold for investigation of armed robbery. Warrants were forthcoming.

THE COURT: Did it say what robbery?

THE WITNESS: No, it did not.

THE COURT: When they checked on the warrant, did it turn out there had never been a warrant issued in Cincinnati?

THE WITNESS: To the best of my knowledge Cincinnati and St. Bernard officers came over that day and I believe they questioned him but I'm not sure if they did that.

THE COURT: Well, did you end up—you took him in I guess because the other officer found the gun?

THE WITNESS: Right. We made an arrest that day because of the weapons.

[11] THE COURT: You knew he was a convicted felon?

THE WITNESS: The charges then were carrying a concealed weapon—the three guns were concealed and in checking the record at the station we found [illegible]; they were all convicted felons.

THE COURT: This has been very helpful. Do you want to ask him anything further, Mr. Arehart?

MR. AREHART: I have no further questions.

THE COURT: Would you care to cross-examine, Mr. Drennen?

MR. DRENNEN: Yes, Your Honor.

CROSS-EXAMINATION—BY MR. DRENNEN

Q. Officer Cope, did Officer Eager ask anyone to chase down Mr. Hensley?

A. He asked that the station broadcast an attempt to locate.

Q. Did he ask you or any other officer to chase down Mr. Hensley—that he had evaded?

A. Directly, no. He just notified the dispatcher.

Q. You don't have a flyer today and you didn't have [12] a flyer that day, did you?

A. In my possession, no.

Q. The transmissions over the police channel do indicate that there was nothing local on Thomas Hensley; is that correct?

A. Would you repeat that, please?

Q. The transmissions over the police channel between Officer Eager and the dispatcher was that there's nothing local on Mr. Hensley; isn't that correct?

A. I really don't recall their answer to a local warrant.

Q. Are you also going to tell me that you also don't know that the dispatcher checked the roll call and there was nothing on the roll call about Mr. Hensley?

A. I remember her checking for the flyer and was unable to relocate—

Q. That's right, and then—

THE COURT: What time are you referring to, Mr. Drennen, in relation to the stop—the same day or later or earlier?

MR. DRENNEN: Judge, Officer Eager called the station and asked for a warrant on Mr. Hensley or Mr. Thomas. There was nothing local. There was nothing on roll call and there was [13] nothing out of Cincinnati.

This all occurred before the officers ever even stopped Mr. Hensley.

THE COURT: I don't want you to testify. I want you to make your questions more precise as to what times you're referring to.

RESUMPTION OF CROSS-EXAMINATION—BY MR. DRENNEN

Q. The only time Officer Eager ever contacted the station that day was just after he said he saw Mr. Hensley; is that correct? He did call the station at that time?

A. He notified them that he had seen him, that's right.

Q. And he asked about a warrant?

A. That's correct.

Q. What was the response?

A. The only response I recall as I said was that they couldn't locate the flyer. I don't recall anything on local.

Q. Did you know where Mr. Hensley lived?

A. I had a vague knowledge of where he was staying and a couple of different locations. That's what we were discussing. I did not know whether he was staying there or not.

[14] Q. Where you stopped him, was that in front of where he was staying?

A. I have no knowledge of whether he was staying there or—

Q. It was on one of those two locations, wasn't it?

A. It's one of the two locations that he hangs out in, yes.

Q. Did he attempt to evade you?

A. No.

Q. When you put your lights on, did he pull over?

A. That's correct.

Q. Did he cooperate with everything you asked him to do?

A. He did.

Q. Officer, when you stopped him did you draw your gun and point it at him and tell him to get out of the car?

A. I drew my gun and held it in the air and ordered him and Mr. Green out of the car.

Q. This flyer was for investigative purposes?

A. Apparently so, yes.

Q. That's all it was for, investigative purposes. And what does investigative purposes mean?

[15] A. Just that. Stop and hold for investigation of a robbery which had occurred.

Q. Has there ever been a warrant issued on that?

A. I have no knowledge of that.

Q. Did you feel that you were in jeopardy at any time that you had to search the vehicle or any officer should have searched his vehicle?

A. I felt that my life was in jeopardy at the time of the stop, I did.

Q. You pulled your gun, right?

A. That's correct.

Q. You felt you had it under control?

A. At that point I did.

Q. Where were these men in relationship to the Cadillac while Officer Rassache decided to search the vehicle?

A. They were standing on the passenger side.

Q. How close to the door?

A. Arm's length, one of them.

Q. How many police officers were there?

A. Four.

Q. Did you still have your gun drawn?

A. No.

Q. When did you put your gun away?

[16] A. When my second back-up unit arrived and patted the two men down and made sure they weren't armed.

Q. Before you put your gun away, where were the two men then?

A. Repeat that, please.

Q. Before you put your gun away, were they at the back of the car with their hands on the hood?

A. Hands on the trunk.

Q. On the trunk. Is that an arm's length away from the door?

A. That's a little more than that.

Q. I'm correct in saying that Mr. Hensley didn't do anything wrong, did he, prior to you finding these guns? He hadn't done anything, had he?

A. I wouldn't know.

Q. He didn't commit a traffic violation, did he?

A. You didn't ask that. No, he didn't.

Q. He didn't commit any offenses that you saw, did he?

A. Not that I saw.

Q. You didn't stop him for evading a police officer, did you?

A. I stopped him for Officer Eager's traffic. I di1 not know for sure what had happened.

[17] Q. You never charged him with evading a police officer, did you?

A. I didn't.

MR. DRENNEN: I have nothing further, Your Honor.

THE COURT: What is your knowledge of Mr. Hensley's past record? Did you have some reason to consider him dangerous to go through all of this with the gun and the back-ups and four policemen and all this?

THE WITNESS: Well, initially the flyer did say armed and dangerous, use extreme caution. Officer Rassache and I discussed it and he was familiar with him and I felt that there was a jeopardy there.

Apparently there was from the weapons that were found.

THE COURT: I'm going to hold this record open, Mr. Arehart. I'm going to take it under submission anyway. This is a very close call. I would like to get this flyer from Cincinnati in the record.

Go over there and get it if you have to. If it exists I'd like to see [18] if and I'd like it in the record before I make a final ruling on this.

Very well, anything further from this officer?

(To the witness) You may step down, Officer.

(Witness stands aside.)

THE COURT: Which officer found the gun? I'd like to hear from him too.

DAVID RASSACHE, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

THE COURT: If you don't mind, Mr. Arehart, I'll just ask him.

MR. AREHART: I don't mind, Your Honor.

THE COURT: What's your name, Officer?

THE WITNESS: I'm Specialist David Rassache, Covington Police Department.

THE COURT: Tell me how you got into this situation on this particular day.

THE WITNESS: I advised Officer Cope of one of the two locations Mr. Hensley [19] might be going to. I checked one area and he checked the other.

He located the vehicle and I proceeded to that area to back him up. Once I arrived, the two gentlemen were standing outside the vehicle near the passenger's side of the car. I looked inside the car—I was standing there and I looked straight down and observed a gun sticking out from underneath the passenger's side seat.

THE COURT: Did you have to open the door of the car and poke your head in or anything or poke your head in through the window to see it or did you just see it from the outside?

THE WITNESS: The door was already open.

THE COURT: Pardon me?

THE WITNESS: The door was standing open.

THE COURT: Which side of the car were you on?

THE WITNESS: Passenger's side.

THE COURT: Which side of the car was the gun on?

[20] THE WITNESS: Passenger's side.

THE COURT: What kind of gun was it?

THE WITNESS: I believe it had black tape on the butt of the gun. I believe it was an H&R .32.

THE COURT: It was a pistol?

THE WITNESS: Yes, sir.

MR. AREHART: We have the gun here, Your Honor.

THE COURT: Let me see it.

MR. AREHART: There were three guns found, Your Honor.

THE COURT: (To the witness) At this time did you fellows suspect Mr. Hensley of anything else that you were investigating?

THE WITNESS: We had thought he might have committed a robbery prior to this on that particular day.

THE COURT: That same day?

THE WITNESS: Yes, sir.

[21] MR. DRENNEN: Your Honor, can the witness repeat that?

THE COURT: He said that he—

THE WITNESS: There were thoughts between us that he might have committed another act that particular day due to the fact that we saw the guns—after I located the guns.

CROSS-EXAMINATION—BY MR. DRENNEN

Q. When did you think he had committed another robbery, before or after you arrested him?

A. Before.

(Mr. Arehart hands gun to witness.)

THE COURT: Is this weapon in evidence?

MR. AREHART: It is not but I'll move to introduce it at this time.

THE COURT: It probably should be.

MR. AREHART: While we're at it, Your Honor, I also have the two other firearms which were found and also the other items in the gym bag including ski masks which were found at the time.

If the Court [22] would like to see those, we would introduce those at this time.

THE COURT: Well, which weapon are you charging him with possessing as the federal offense?

MR. AREHART: Your Honor, Mr. Hensley is charged with the other two firearms, the one that was found in the jacket which was sitting on the front seat and the one that was found in the gym bag with the ski masks.

Mr. Green, the co-defendant, is charged with this one because it was underneath where Mr. Green was sitting.

THE COURT: (To the witness) What part of this pistol could you see, Officer, just looking in the door?

THE WITNESS: This part right here (indicating).

THE COURT: Let the record show he's indicating the taped handle or butt of the pistol. Do you want to ask him anything, Mr. Arehart?

MR. AREHART: I have no questions, Your Honor.

THE COURT: Mr. Drennen?

[23] CROSS-EXAMINATION RESUMED—BY MR. DRENNEN

Q. So that I understand, Officer Ramacho, neither Mr. Hensley nor Mr. Green were under arrest at the time you started to peer into the car?

A. That's correct.

Q. It's my understanding also that the weapon that you've shown to the Court was under the seat of Mr. Green?

A. Yes, sir.

Q. Did you know Mr. Green?

A. I've known him by name but I never had—

Q. Did you know on the date that you arrested him that he was a convicted felon?

A. Yes, sir.

Q. You did know that. Was that before or after you arrested him?

A. Before.

Q. You're sure about that?

A. Yes, sir.

Q. Then you arrested Mr. Green for possessing of that firearm, is that correct?

A. Yes, sir.

Q. Did you arrest Mr. Hensley at that time?

A. Within a few seconds later.

[24] Q. Was it before or after you went back in the car and found a gun wrapped up in a jacket and a gun found in the gym bag?

A. Immediately after finding this gun we searched the rest of the vehicle and found another gun underneath the jacket. I placed Mr. Hensley under arrest at that time.

Q. So I understand, this car was not illegally parked, was it?

A. No, sir, it wasn't.

Q. You weren't performing any type of inventory on the vehicle when you were looking in?

A. No, sir.

Q. You say the door was open. You said you were standing there. Did you step inside the door and look in or did you stand outside the door and look through the window?

A. I was standing outside the door and I looked straight down and I could see the butt of the gun.

Q. Was the door open on a 45 degree angle or was it just barely open?

A. It was completely open.

Q. Completely open would be like at a 90 degree angle?

[25] A. Yes. I believe it was open all the way.

Q. Open all the way. So you were standing looking through the window down into the front seat?

A. Yes, sir.

Q. You obviously didn't see the gun wrapped up in a coat, did you?

A. No, sir.

Q. You didn't see the gun in the gym bag either?

A. No, sir.

Q. Did you also read this flyer out of Cincinnati?

A. Yes, sir.

Q. You're sure about that?

A. I had it read to me. I didn't read it.

Q. Did you also hear the transmissions by Officer Eagre to the station?

A. Yes, Sir.

MR. DRENNEN: I have nothing further, Your Honor.

THE COURT: (To the witness) Did it turn out that this flyer had been withdrawn at the time of this stop?

MR. AREHART: I don't believe there's any evidence that the Covington Police Department had been notified one way or another whether [26] it was still outstanding and that's why—

THE COURT: That wasn't the question. The question was had Cincinnati withdrawn it at that time? Some of those cases make that a relevant factor—whether in fact at the time of the stop—

MR. AREHART: I don't know if they had or not. That's never been—

THE COURT: If the officer had known all the facts—not just that he was acting in good faith but if the officer had known all the facts he would have had the probable cause.

As I see this it's not a probable cause problem. It's a stop and frisk problem, and if they had a right to stop and frisk then what was in plain view there then, the Magistrate found that it was in plain view and I would respect his findings—if it was a legitimate stop and frisk or a legitimate stop and hold or whatever you want to call it—legitimate detention—then whatever the officer saw in plain view was justified.

I don't think probable cause is necessary. But to determine that I'm going to have to know what was in that bulletin.

(27) MR. AREHART: We'll try to get it for you.

THE COURT: I want you to make every effort to get that bulletin in this record. Maybe you'll have to go to Cincinnati. They would keep it on file, wouldn't they?

MR. AREHART: I have no idea but I'll check it out.

THE COURT: Let's get that in the record. I'm going to hold the record open until Monday. I'm going out of town tomorrow anyway.

I'm going to hold the record open until Monday and I'd like to get it in the record. You can do it by stipulation with Mr. Drennen. I'd like to know when the bulletin was issued and when it was withdrawn by Cincinnati and whether or not—when it was withdrawn, if Covington was notified of that.

If you can do it by stipulation, fine, and if you have to bring in another witness we can do that if you can't agree on a stipulation.

I think that's a necessary factor to know in deciding this. Where are we (28) in the speedy trial of this matter? Any Speed Trial Act problems? We've had all these problems.

MR. AREHART: If Your Honor please, he's insisting on a speedy trial but the act itself provides that any motion which is under submission by the Court is excludable under the Speedy Trial Act.

I don't think there's any problem there.

THE COURT: In any event the Court would find that because of these complications that an extension of the Speedy Trial limitations would be justified and that the interest of reaching a correct result of the case would outweight the short delay that would be involved in getting this additional information—that would justify extending the Speedy Trial Act.

The Court will find that the time it has taken to do this is excludable time. Is there something you want to bring up, Mr. Drennen?

MR. DRENNEN: Your Honor, just for the record Mr. Hensley is not saying he will not waive the speedy trial. It's just simply that the sole issue in this case is whether this evidence is suppressible or not.

(29) THE COURT: I understand.

MR. DRENNEN: He didn't want to take up the Court's time with a delayed trial. He just wanted to expedite the matter.

THE COURT: I appreciate that. I appreciate the officers coming back. I will say that this is a—in the little over two and a half years I've been here, this is the closest one of these I've had yet. I want to get all the facts in and take whatever time I need to try to handle it correctly.

Anything else anybody else wants to bring up?

MR. AREHART: No, Your Honor.

MR. DRENNEN: Nothing further, Your Honor.

THE COURT: We will be in recess until 10:00 then, Mr. Marshal.

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And these were all the proceedings had and reported upon this case this date.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

Cov. Crim. 82-29

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT

MOTION TO SUPPRESS

The above-entitled matter came on hearing before the Honorable William O. Bertelsman, Judge, on October 4, 1982.

APPEARANCES:

FOR THE GOVERNMENT:

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FOR THE DEFENDANT:

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Allen S. McClung
Court Reporter

EXAMINATION INDEX

[3] Pursuant to the call of the case by Clerk of Courts, the following transpired:

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THE COURT: Let the record note the appearance of counsel and the presence of the defendant.

What is it you want to do this morning, Mr. Arehart?

MR. AREHART: If Your Honor please, just to refresh your memory at the last hearing we had you directed the United States to try to locate this communication or flyer which was used by Officer Cope to stop the defendant and if possible to stipulate to that and put it in the record.

We have located the flyer and Mr. Drennen has agreed to stipulate to the authenticity of that. I believe under the *Whiteley* case and other cases, the United States has to show that there was probable cause to issue that communication.

That's why we're here today. We have the officer—Officer Ken Davis from the originating police department who will testify as to a statement he received on that same date [4] implicating—

THE COURT: Was it still in effect as of the time of these events?

MR. AREHART: Yes, it was. In fact, he was eventually arrested on that charge I believe on January the 19th and officially charged with the underlying offense.

THE COURT: Do you have some witness you want to put on at this time?

MR. AREHART: Yes, Your Honor, I do. I do have one other matter. Since this communication was retrieved from the Indian Hills Police Department, Covington still did not have it and I have the officer here—Officer Cope to testify that it is in fact the same one he saw unless Mr. Drennen would be willing to stipulate that.

If he won't, I will be willing to put the officer on.

THE COURT: Would you be willing to make such a stipulation, Mr. Drennen?

MR. DRENNEN: Your Honor, I can't testify for Officer Cope. I can only stipulate that this is a certified copy of what Indian Hills had in its records.

[5] THE COURT: Just put your witness—it will be shorter in the long run just to put your witnesses on.

MR. AREHART: Your Honor, the United States would call Officer Cope.

MR. DRENNEN: Your Honor, we would ask that there be a separation of witnesses.

THE COURT: All right. There will be a separation of witnesses. Everyone who is going to testify in this case please excuse themselves.

DAN COPE, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. AREHART

Q. Will you state your name, sir?

A. Danny Cope.

Q. Are you the same Officer Cope who testified here previously in this hearing?

A. Yes, sir.

MR. AREHART: Your Honor, I would like to have the witness handed what appears to be a teletype dated December 10th, 1981. I believe a copy of it is already in the record.

THE COURT: Very well.

[6] RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Officer Cope, I believe previously you have testified that you had seen a flyer or a communication concerning one Thomas J. Hensley and on the basis of that flyer saying he was wanted for investigation concerning a robbery and you stopped him on the day in question—December the 12th. Would you look at that flyer or that communication which has been handed to you and tell the Court if that is in fact a copy of the one you saw as you testified within two weeks prior to stopping Mr. Hensley?

A. Yes, sir, it is an exact copy of the one that I saw.

Q. What is the date on that communication?

A. December the 10th.

Q. So that would have been six days prior to you stopping Mr. Hensley?

A. Yes, sir.

MR. AREHART: I believe the Court can read it rather than have the witness—

THE COURT: Just to make it easier for whoever has to read this record, I'll read it into the record. It says, "Wanted for investigation only for aggravated robbery." That's the heading. [7] "Wanted for investigation of aggravated robbery which occurred at the Moon Tavern"—it's a little blurred—"631 Vine Street, St. Bernard, Ohio, on December"—I can't read that—"6th, 1981 at 6:19 a.m. in one Thomas James Hensley. Male, white, 1-18-44. CTLNO. 21328. Social Security 256-36-6974, six feet, 190 pounds. Subject"—I can't read these abbreviations.

MR. AREHART: Last known address.

THE COURT: Subject's last known address as of—you go ahead and finish reading it, Mr. Arehart.

MR. AREHART: "Last known address as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous."

Your Honor, I have one other question.

THE COURT: Go ahead.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Were you aware that to pick up and hold a subject that there is a law that allows a police officer to hold a subject for some 72 hours for investigation prior to getting a warrant?

[8] A. I was familiar that Ohio law states they can stop and hold for a reasonable period of time. I'm not personally familiar with the period of time.

MR. DRENNEN: Your Honor, I'm going to interpose an objection. I don't know of any law in Ohio that says that. The law in Ohio says you have to have a warrant to arrest and you cannot detain someone for 72 hours without a warrant.

THE COURT: I don't know what the law of Ohio says. I'm going to sustain the objection.

MR. AREHART: That's all I have, Your Honor.

CROSS-EXAMINATION—BY MR. DRENNEN

Q. Officer Cope, you didn't have any personal knowledge concerning this aggravated robbery, did you?

A. No.

Q. Did you previously testify that you knew where Mr. Hensley lived?

A. No. I previously testified that Officer Ramache on Channel 2 told me two locations where he might be found.

Q. So you had no personal knowledge as to where he may or may not have lived?

[9] A. No, I didn't.

Q. Do you remember what day you read this—where this was read at roll call?

A. No, sir. You see, it was read every day up until the point that we found him. Until whatever day that we got this on which was apparently December the 10th, it would have been read at every roll call every day until it was either withdrawn or the man was located.

Q. Do you know whether this has ever been withdrawn?

A. Officially I don't believe it has, no.

Q. Were you here that day that they played the tapes here in court?

A. No, I wasn't.

Q. Have you ever heard the tapes?

A. No, I haven't.

MR. DRENNEN: I have nothing further, Your Honor.

THE COURT: Do you have anything further for this witness?

MR. AREHART: I have nothing further, Your Honor.

THE COURT: (To the witness) You may step down.

[10] (Witness stands aside.)

THE COURT: Call your next witness, Mr. Arehart.

MR. AREHART: Your Honor, the United States calls Ken Davis.

KENNETH DAVIS, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. AREHART

Q. Will you state your name, sir?
A. Kenneth Davis.
Q. How are you employed?
A. Police officer for the City of St. Bernard.
Q. For how long have you been so employed?
A. For seven years.

THE COURT: You better say for the record what state that's in.

THE WITNESS: It's in Hamilton County, Ohio.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Officer, on December the 10th, 1981, I want to ask you if you had an occasion to take a statement from a particular person concerning a robbery at the Moon Tavern in St. Bernard and whether or not on the basis of [11] that statement you issued some sort of communication for the 'stop and hold of one Thomas J. Hensley?

A. Yes, I did.

MR. AREHART: Your Honor, I'd like to show the witness a copy of the teletype and also a copy of the statement.

THE COURT: Very well.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. First of all, Officer, would you refer to the statement there and tell the Court what time you took this statement, who you took it from and whether or not that statement implicated Thomas Hensley in the robbery of the Moon Tavern on December the 4th, 1981?

A. It was taken at 1:55 p.m.—

MR. DRENNEN: Your Honor, if I may I would interpose an objection to what that statement may have said. The witness who made the statement should be the individual who comes and testifies before this Court.

THE COURT: Well, I think it's a question of what the police officers know, whether they had probable cause to believe.

MR. AREHART: Your Honor, any stop is normally put on hearsay with the complaining [12] witness and this is the complaining witness.

THE COURT: I'll overrule the objection. You may proceed.

THE WITNESS: The statement was taken at 1:55 p.m. from one Janie Hansford. She was currently residing at the Cincinnati Correctional Institute at that time.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Was she advised of her rights at that time?
A. Yes, she was.
Q. Tell the Judge what the contents of that statement are?
A. Basically what she had stated was how the robbery—the aggravated robbery—had gotten set up at the Moon Tavern and who all was involved in the incident itself.
Q. Was there in fact an aggravated robbery at the Moon Tavern in St. Bernard on December the 4th?
A. Yes, there was.
Q. Does she implicate a man by the name of Tommie in that statement?
A. Yes, that's correct.
Q. What does she say his part was in the aggravated robbery?
[13] A. She said that he was the driver.
Q. Where did she get this information that she was relaying to you?
A. She was going with—Janie Hansford was going with Sonny Pfeifer's son, and they had went in and set the robbery up by telling Sonny what time that the Moon Tavern opened up.
Q. She was actually part of setting up this robbery?
A. Yes, she was.
Q. Did she identify to you who the person was she referred to as Tommie in that statement?
A. Yes, she did.

MR. DRENNEN: Your Honor, I am going to again interpose an objection. Now he's going outside the affidavit and now he's going to testify to what someone told him. There's no verification of that—other than the testimony now of the officer.

THE COURT: I don't think these hearings are under the Federal Rules of Evidence. Overruled.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Who did she identify the person named as Tommie as being?

[14] A. Tommie Hensley.

MR. AREHART: I believe that's all I have, Your Honor. I would move to introduce a copy of that statement—oh, one other thing.

RESUMPTION OF DIRECT EXAMINATION—BY MR. AREHART

Q. Is this communication that you issued to stop and hold Mr. Hensley—had it been withdrawn as of December the 16th, 1981?

A. No, sir.

Q. In fact, was not Mr. Hensley at one time charged in January of 1982 with that offense?

A. I don't exactly remember the exact date that we filed a warrant but he was arrested in May—May 13th, 1982 at 11:25 p.m.

MR. AREHART: That's all I have at this point.

CROSS-EXAMINATION—BY MR. DRENNEN

Q. Officer, so that I understand this affidavit, this Miss Hansford—what was her name again?

A. Janie Hansford.

Q. Was she telling you what someone had told her?

A. No. She was actually involved in the setting up of the aggravated robbery.

[15] Q. The reference to Mr. Hensley being the driver, I'll ask you to look at that last couple of pages and ask you again whether or not she is referring to what someone told her as to who the driver was?

A. Okay. Sonny told her.

Q. So she was relying on what someone else told her, is that correct?

A. That's correct.

Q. How many times have you ever used this woman as an informant before?

A. She testified at the Grand Jury against Sonny Pfeifer for the aggravated robbery.

Q. Before or after she gave this statement?

A. Please?

Q. Before or after she gave this statement?

A. She testified after she gave this statement.

Q. Had you ever used her before she gave this statement as a reliable informant? Had she ever led you or any other police agency to the conviction of any other people?

A. No, sir.

Q. Yet you determined that this woman was a reliable informant and based upon which you issued a flyer; is that correct?

[16] A. Well, she gave us a statement of her involvement along with everybody else's.

Q. I noticed that this was a flyer for investigation and not for an arrest; is that correct?

A. That's correct.

Q. Did you feel at the time you issued that flyer that you had a basis to arrest Mr. Hensley?

A. With the statement alone?

Q. With what you—

A. I felt like we had enough probable cause in the State of Ohio to bring him in for investigation, yes, sir.

Q. That didn't answer my question. You issued a statement saying stop for investigation only; is that correct? You issued that, did you not?

A. Yes, I did, but when we bring somebody in for investigation they are under arrest technically.

Q. So when you issued it you were issuing it for the purpose of arresting Mr. Hensley; is that correct?

A. That's correct.

Q. So you weren't issuing it for this 72-hour stop that Officer Cope volunteered, were you?

A. Well, we're allowed to hold them for 72 hours.

Q. Is there a law in Ohio that says that, that you [17] can cite to this Court?

A. To this Court?

Q. To this Court that says that you have authority in Ohio to stop anyone and detain them for 72 hours for purposes of investigation.

A. In Ohio.

Q. What is the statute—what's the law that says you can do that?

A. I wouldn't know the exact statute.

Q. Would it be a fair statement to say that on the day that you issued this on December the 10th of 1981 you didn't feel you had probable cause to arrest Mr. Hensley?

A. It was a judgment thing at that time and at that time I had put it out for investigation.

Q. Have you ever brought Mr. Hensley to trial over this charge?

A. We took him to the Grand Jury but the witness wasn't there to testify.

Q. So your sole basis for issuing this flyer is based upon the testimony or this affidavit of this lady who says that someone else told her—and you've never used her before as a reliable informant—is that correct?

[18] A. No, sir.

Q. It's not correct? What else did you rely on to issue that flyer?

A. I relied on the fact that Sonny Pfeifer had told her and he was one of the people involved in the robbery.

Q. Did Sonny Pfeifer implicate Mr. Hensley in this charge?

A. Sonny Pfeifer was never questioned.

Q. So the only person you questioned then is this woman; is that correct?

A. That's correct.

Q. And the only information she had is what this Sonny Pfeifer told her; is that correct—as to the involvement of Mr. Hensley?

A. Yes.

Q. And it's also a fact that you had never used this woman before as an informant to establish her as a reliable informant to give the police any information concerning any involvement in this crime by Mr. Hensley—is that also correct?

A. Could you repeat that, please?

Q. You have never used this woman prior to December 10th—you had never used her as a reliable [19] informant helping you in the investigation of any criminal activity?

A. No, sir.

Q. So that's what you based your flyer on for Mr. Hensley; is that correct?

A. Yes, sir.

MR. DRENNEN: Nothing further, Your Honor.

THE COURT: Anything else, Mr. Arehart?

MR. AREHART: I have nothing further.

MR. DRENNEN: One other thing, Your Honor.

RESUMPTION OF CROSS-EXAMINATION—BY MR. DRENNEN

Q. This flyer makes reference to, "Use caution, consider subject armed and dangerous." Is there anywhere in that affidavit that says Mr. Hensley is armed and dangerous?

A. We've had previous contact with him—the St. Bernard Police have.

Q. But there's nothing in that affidavit, is there?

A. In this affidavit?

Q. In that affidavit. Where does it say that [20] Mr. Hensley had a weapon of any type or that he was anything other than a supposed driver?

A. That's all that's there.

MR. DRENNEN: That's all, Your Honor.

THE COURT: Anything else?

MR. AREHART: Just one question.

REDIRECT EXAMINATION—BY MR. AREHART

Q. Based on your prior contact with Mr. Hensley, did you consider him armed and dangerous?

A. Yes, sir.

MR. AREHART: I believe that's all.

MR. DRENNEN: Nothing further.

THE COURT: (To the witness) You may step down, Officer.

(Witness stands aside.)

MR. AREHART: Your Honor, I would move to introduce this statement.

THE COURT: Any objection?

MR. DRENNEN: Your Honor, we would object. I don't think there's been any [21] foundation by the Government that the individual who gave this statement was a reliable informant upon which the police officer had ever in their past history—

THE COURT: That goes to the weight. Let's just get it in the record so we can look at it. We'll admit it and determine what weight it should have when we decide the case. Let it be admitted.

MR. AREHART: That's all the evidence I have at this time, Your Honor.

THE COURT: Do you have any evidence to present, Mr. Drennen?

MR. DRENNEN: Yes, Your Honor. We would like to call Officer Rassache back to the stand.

DAVID RASSACHE, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows:

DIRECT EXAMINATION—BY MR. DRENNEN

Q. Officer, would you state your name for the record again.

A. Specialist David Rassache, Covington Police Department.

Q. Officer Rassache, how long have you been [22] employed by the Covington Police Department?

A. Eleven years.

Q. Officer, did you have an occasion to be involved in the stopping of Mr. Hensley on December 16th of 1981?

A. Yes, sir, I did.

Q. Were you also aware of a teletype that had been issued by Cincinnati concerning stopping for investigation of Mr. Hensley?

A. Yes, sir.

Q. Had you also looked at that and seen it or heard it read to you?

A. I had it read to me.

MR. DRENNEN: Your Honor, I'd like to have the Specialist handed a copy of the teletype and let him look at it.

THE COURT: Very well.

(This was done.)

RESUMPTION OF DIRECT EXAMINATION—BY MR. DRENNEN

Q. Specialist Rassache, if you would read that and see if that's a true and accurate copy of what you had either heard read to you or you personally read.

A. Yes, sir, it is.

Q. Did you read it or did you have it read to you [23] at roll call?

A. Had it read to me.

Q. Do you have any recollection as to when that would have been? The teletype is dated December 10th of '81 at the top.

A. I believe it was the first week of December, somewhere around the 10th.

Q. Would it have been closer to December the 10th or closer to December 16th?

A. It was closer to December the 10th.

Q. Officer Rassache, Officer Cope has testified to the fact that he received information from you over Channel 2 as to two possible addresses where Mr. Hensley could be located, is that correct?

A. Yes, sir.

Q. How did you know where Mr. Hensley could be located?

A. I've seen him frequent the areas of both locations that I mentioned to Officer Cope.

Q. So on December the 10th of 1981 you would have also known those two locations?

A. Yes, sir.

Q. Did you advise your superiors where they could locate Mr. Hensley?

[24] A. Yes, sir, they were looking for him and they had been to that location.

Q. Did you personally go by there?

A. Yes, sir.

Q. So between December the 10th and December the 16th you were in fact looking for Mr. Hensley and you knew where he lived or you knew where he frequented?

A. Yes, sir.

Q. Would it be a fair statement to say that you also have no personal knowledge concerning anything that's in that flyer but just the flyer itself?

A. Yes, sir.

MR. DRENNEN: I have nothing further, Your Honor.

CROSS-EXAMINATION—BY MR. AREHART

Q. Based upon your communication with the other officers and also based upon your own investigation, isn't it true that between the 10th and the 16th going by these places where Mr. Hensley had been known to frequent, that you were unable to locate him?

A. Yes, sir.

Q. And is it not another true statement that these were not permanent residences of Mr. Hensley, they were just places where he had been seen in the past?

[25] A. As far as I know, yes, sir.

Q. And the communication itself from St. Bernard indicated his last known address was the Drake Motel?

A. Yes, sir.

MR. AREHART: No further questions.

MR. DRENNEN: I have nothing further, Your Honor.

THE COURT: (To the witness) You may step aside.

(Witness stands aside.)

THE COURT: Any other evidence this morning?

MR. AREHART: Not from the United States, Your Honor.

MR. DRENNEN: Nothing from the defense, Your Honor.

THE COURT: Very well. Do you gentlemen want to file supplemental briefs to discuss this additional testimony since the original briefs were filed on the Magistrate's report? Or do you just want me to take it under submission?

MR. DRENNEN: Your Honor, I would like to file a supplemental brief because of the reliability of the informant and whether that gives—

THE COURT: I think that might be a good idea. How much time do you need?

MR. DRENNEN: A week, Judge.

[20] Question as to the

THE COURT: All right. A week from today. Mr. Arehart? Do you want to respond?

MR. AREHART: Five days would be fine, Your Honor.

THE COURT: I'll give you a week. I will take it under submission on those additional briefs. Anything else this morning?

MR. DRENNEN: No, Your Honor.

MR. AREHART: Your Honor, only the fact that I think the Court ought to find that this additional time is excludable under the Speedy Trial Act.

THE COURT: All right. I think I made that finding last week which covers this.

MR. DRENNEN: Yes, Your Honor, I believe it does.

THE COURT: Mr. Marshal, you may recess court until 2 o'clock this afternoon.

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[27] And these were all the proceedings had and reported upon this case this date.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

Cov. Crim. 83-29

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. HENSLEY, DEFENDANT.

TRIAL TO COURT

The above-entitled matter came on hearing before the Honorable William O. Bertelsman, Judge, on October 25, 1982.

APPEARANCES:

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Attorney at Law
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Allen S. McClung
Court Reporter

EXAMINATION INDEX

[3] Pursuant to the call of the case by the Clerk of Courts, the following transpired:

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THE COURT: Mr. Drennen, come forth with your client.

MR. DRENNEN: Yes, Your Honor.

THE COURT: Very well. Now, you want to proceed with a long form plea or what we call in the shorthand way, a long form plea?

MR. DRENNEN: That is correct, Your Honor. That is what we wish to do.

THE COURT: Come forward with your client. I think I have to go through something akin to the Rule 11 colloquy with him under the cases. What do you want to do, have an agent to testify, Mr. Arehart?

MR. AREHART: If Your Honor please, Mr. Drennen has agreed to just about stipulate to everything but I think we ought to at least put Officer Cope on to say that he's the one that found the two guns listed in the indictment. The Court has already seen the firearms, so we don't plan to introduce it.

He is willing to stipulate that he's a convicted felon and that the guns were manufactured out of the State of Kentucky. This ought to be real [4] short. However, I would like to put Officer Cope on to say that he found the guns.

THE COURT: Very well. I think the cases say—although this is somewhat of an unusual situation—the cases that have come out within the last year or so say that it's the duty of the Court in a situation like this where the defendant is going to give up some substantial right to be sure that he understands what he's doing.

Mr. Hensley, I will have some dialogue with you at this time. I don't think it has to be as full as the Rule 11 colloquy but it should be—cover some of it. Of course, you don't have to acknowledge your guilt or anything under this procedure.

Mr. Hensley, how old are you?

THE DEFENDANT: 38.

THE COURT: How far did you go in school?

THE DEFENDANT: Seventh grade.

THE COURT: Have you had a chance to discuss this case and the procedures with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: Are you satisfied with your attorney's representation?

THE DEFENDANT: Yes.

[5] THE COURT: Do you understand what we're going to do here this afternoon?

THE DEFENDANT: I think I do.

THE COURT: Let me explain it to you just to be sure. We call this a long form plea—at least that's what it's called around here in that under this procedure you do preserve your rights to attack the search on appeal.

But what will happen is that you have waived your right to a jury trial if you go through with this procedure. The United States will call a witness and your attorney will enter into certain stipulations.

It's pretty certain that the Court would then find you guilty and on appeal, you would only have the right to raise the search. A sentence will be passed at the appropriate time, whatever that might be. On appeal, about the only meaningful issue you would have to raise is the search.

If you do not wish to follow that procedure, you would have a right to a full blown jury trial where you would not have to say anything, take the stand or—the United States would have to prove the case against you and you would still have all your rights on appeal but you would have to go through a jury trial—you would have the privilege of going through a jury trial, I should say.

[6] The jury would be instructed that they did not have to find you—they should not find you guilty unless they were convinced by proof beyond a reasonable doubt. You would not have to testify. You could call witnesses on your own behalf, etc.

You will be giving up those rights by following the procedures we're going to follow this afternoon. Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: Is this what you want to do now?

THE DEFENDANT: Yes.

THE COURT: All right. I think you are an experienced man in these criminals procedures. You have an experienced attorney. I think you are fully cognizant of your rights and what you are waiving.

All right. We will go through it this way then. I should advise you that the penalty is imprisonment of not more than two years, a fine of not more than $10,000, or both. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And there is no guarantee involved in this procedure what the sentence would be. Do you understand that?

[7] THE DEFENDANT: Yes, sir.

THE COURT: There's no plea bargaining or anything in connection with this; is that right?

MR. DRENNEN: There is none, Your Honor.

THE COURT: You're just doing it to save your time and the Court's time?

Very weil, let's proceed. You may be seated.

Call your witness, Mr. Arehart.

MR. AREHART: Your Honor, the United States calls Officer Cope.

DAN COPE, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

DIRECT EXAMINATON:—BY MR. AREHART

Q. Would you state your name, sir.

A. Dan Cope.

Q. How are you employed?

A. Patrolman with the City of Covington Police Department.

Q. How long have you been so employed?

A. Nearly five years.

Q. Officer Cope, on December 16th, 1981, did you have an occasion to stop the defendant, Tommy Hensley, while he was driving an automobile in the [8] City of Covington?

A. Yes, sir.

Q. Can you tell us approximately what time of day that was?

A. I believe it was about 1:30 in the afternoon.

Q. As a result of that search or of that stop, I believe another officer that accompanied you found a weapon underneath the passenger's seat of the car; is that correct?

A. Yes, sir.

Q. As a result of that, codefendant Green was charged with carrying a concealed weapon.

A. Yes, sir.

Q. After that particular firearm was found did you have occasion to further search the automobile and find two firearms?

A. Yes, sir, I did.

Q. Tell the Court where you found the firearms and what types were they.

A. The first weapon that I found was wrapped up inside a black leather jacket which was tucked in between the front seat of the driver's and passenger's side. That was a short barrelled Colt .38 caliber revolver with no serial number.

I then removed the jacket from the car and [9] then removed the weapon from the jacket.

From the back window there was a gym bag visible on the back seat. I entered the car and removed the gym bag. Inside that gym bag, we found a third revolver which was a long barrelled, Colt .38 caliber revolver.

Q. Was the defendant, Hensley, driving the automobile at that time?

A. Yes, sir.

Q. Do you know whose automobile it was?

A. No, sir, I don't.

MR. AREHART: No further questions.

THE COURT: What kind of weapon was it again?

THE WITNESS: They were both Colts. The one in the coat in the front seat was a short barrelled, snub-nosed, .38 Colt. The one in the back was a four inch barrel, .38 Colt.

THE COURT: How do you know whether one of them belonged to Mr. Henaley or was possessed by Mr. Hensley?

THE WITNESS: Mr. Green had a jacket on. Mr. Hensley did not. So, I took the jacket in the front to be Mr.

Hensley's and the snub-nosed was wrapped up inside that jacket.

[10] THE COURT: And there was a weapon in there. All right. Do you care to ask him any questions, Mr. Drennen?

MR. DRENNEN: No, Your Honor. We have no questions. Your Honor, we will stipulate that the vehicle belonged to Mr. Hensley and everything in it was his. We've already stipulated that in the Suppression Hearing. I think the Government already has a statement from Mr. Hensley admitting that they were his.

THE COURT: Very well. (To the witness) You can step down, Officer.

(Witness stands aside.)

MR. DRENNEN: Your Honor, we are also willing to stipulate that Mr. Hensley has previously been convicted of a felony.

THE COURT: Anything else, Mr. Arehart?

MR. AREHART: Your Honor, the only other stipulation that we've agreed upon is the fact that the firearms were manufactured outside the State of Kentucky.

MR. DRENNEN: That is correct, Your Honor. I don't believe that there are any firearm manufacturers in the State of Kentucky. We are willing to stipulate that.

[11] THE COURT: Anything else anybody wants to offer?

MR. AREHART: Your Honor, in view of the stipulation that it's his car and he owned everthing in it, we have nothing further.

MR. DRENNEN: Your Honor, the defense has nothing further.

THE COURT: Very well. What this amounts to is since the rules of criminal procedure do not permit a conditional plea of guilty—that is a plea preserving the right to raise the search on appeal—the findings concerning the search—what we have done here is we've proceeded with a short trial without a jury. That's what it amounts to.

As required, the Court must then make findings of fact and conclusions of law. The Court will find Mr. Hensley guilty of a violation of 18 United States Code, Section 1202(a)(1) in that on or about the 16th day of December at Covington, in the Eastern District of Kentucky, he having

previously been convicted of a felony—that is, on the 9th day of December, 1976, in the Phelps County District Court at Holdridge, Nebraska, of breaking and entering, a felony, did receive and possess in commerce and affecting commerce, [12] two firearms, that is, two .38 caliber Colt revolvers.

In addition to these findings, the court will adopt by reference the findings of fact made by the Court in the Magistrate's—I think there are two sets of them which are already previously in the record—the conclusion of law being that Mr. Hensley is found guilty of this offense.

We will proceed with the sentence. Where are we on the presentence report, Mr. Johnson?

MR. JOHNSON: Your Honor, I am advised that the presentence report has been completed with the exception of a few typographical changes. It will be ready for submission by this time tomorrow.

THE COURT: All right. I'm going out of town Thursday. We can have this sentencing tomorrow or Wednesday if that is satisfactory with counsel. Mr. Arehart?

MR. AREHART: Your Honor, I would prefer to do it tomorrow if possible.

THE COURT: Can you be ready tomorrow, Mr. Johnson?

MR. JOHNSON: Yes, Your Honor.

THE COURT: Very well. Let's do it at 3 o'clock tomorrow. I think I'm going to be free pretty much all day. Is that all right with you, Mr. Drennen?

[13] MR. DRENNEN: That's five, Your Honor.

THE COURT: Very well. We will have sentencing in this case at 3 o'clock tomorrow.

Anything else in this case? Is he in custody?

MR. AREHART: No, Your Honor, he's out on bond. We would ask that he remain on the same bond.

THE COURT: Very well. He will remain free on the same bond. We will be in recess for about five minutes and then continue with the civil case.

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These are all the proceedings had and reported upon this matter this date.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

OCTOBER 22, 1982

Cov. Crim. 82-29

THE UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERT RAYMOND GREEN, ET /'., DEFENDANTS.

MOTION TO SUPPRESS

Before the Honorable J. Gregory Wehrman, Magistrate of the District Court.

APPEARANCES

FOR THE GOVERNMENT:
James E. Arehart, Esq.
Assistant U.S. Attorney
P.O. Box 1490
Lexington, Kentucky 40591

FOR THE DEFENDANT:
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Allen S. McClung
Court Reporter

EXAMINATION INDEX

[3] Pursuant to the call of the case by the Clerk of Courts, the following transpired:

THE COURT: Let the record reflect that the defendant, Albert Green, is present in court with his attorney, Timothy Smith. The United States is present by Mr. Arehart.

We are here on a Suppression Motion filed by the defendant Green which was set for a hearing originally on October 21st and continued until October 22nd. Mr. Smith, are you ready to proceed?

MR. SMITH: I am prepared, Your Honor. I would like to call Officer Cope at this time. I would also move for a separation of the witnesses.

THE COURT: Agent Rapier, are you going to be testifying in this?

AGENT RAPIER: I don't believe so, Your Honor.

THE COURT: Mr. Arehart, Mr. Rapier is not going to testify?

MR. AREHART: That's correct, Your Honor.

DAN COPE, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows:

DIRECT EXAMINATION:
BY MR. SMITH

Q. Officer, will you state your name and address.

[4] A. Dan Cope. Patrolman for the City of Covington. That address is 20th and Madison.

Q. You are a police officer with the Covington Police Department?

A. Yes sir, that's correct.

Q. Were you a police officer with the Covington Police Department on December 10, 1961?

A. I was.

Q. While on duty, did you participate in the stopping of a vehicle driven by Tommy Hensley in which Albert Ray Green was a passenger.

A. I was thinking that it was December 16th, sir. I may have my dates mixed—

MR. AREHART: Your Honor, December the 10th is the date of the teletype. The 16th is the day of the arrest.

MR. SMITH: I'm sorry.

THE WITNESS: Yes, sir.

RESUMPTION OF DIRECT EXAMINATION:
BY MR. SMITH

Q. Did you forcibly stop the car? In other words, you turned—

A. I made a traffic stop. I turned the blue lights on.

Q. Did you observe these traffic violations?

A. No, sir.

[5] Q. You ordered them both out of the car?

A. I did.

Q. Was that at gunpoint?

A. I had my gun out but it was not at gunpoint.

Q. Did you tell both passengers or both the occupants of the vehicle to get out of the car?

A. I did, after I was out.

Q. Did they both get out?

A. They did.

Q. Did you have them put their hands on the top of the car?

A. That's correct.

Q. And I understand that you had them slide back to the back of the car?

A. That's correct.

MR. SMITH. (To Mr. Arehart) Where's the gun?

MR. AREHART: I think we have already introduced it into evidence in another—

THE COURT: What gun are you talking about?

THE WITNESS: I think the gun that was first located is still in there—it's the one with the taped handle.

MR. AREHART: Your Honor, that was [6] introduced in front of Judge Bertelsman when we had the rehearing on the rehearing.

THE COURT: All right. Can we stipulate what gun you're talking about?

MR. AREHART: That's fine with me.

MR. SMITH: Pardon me?

THE COURT: Which gun are we talking about?

MR. SMITH: The one located under the passenger's front seat.

MR. AREHART: That's a Harrington and Richardson, .32 caliber.

THE COURT: Give that to me again.

MR. AREHART: Harrington and Richardson .32 caliber, Smith and Wesson revolver.

THE COURT: All right.

THE WITNESS: Your Honor, the Smith and Wesson was the third gun. The first gun was a Harrington and Richardson .32. The second and third guns were Smith and Wesson .38's.

THE COURT: All right. For the record then, you're going to be asking the officer about the first gun he located that had a taped handle on it and was located under the passenger's seat and it was a .32 caliber?

[7] MR. SMITH: Yes, sir.

DIRECT EXAMINATION RESUMED BY MR. SMITH:

Q. Now, that gun that was taken out of the car by—who took the gun out of the car?

A. Officer Rassache.

Q. And that was in your presence?

A. Yes, sir.

Q. And as a result of his going into the car after you had the two men with their hands—or under control behind the car?

A. That was a result of him stepping around behind the men while I was speaking to them looking in the door which was left open by Mr. Green and seeing the handle of the gun underneath the front seat. He then went into the car and removed the gun.

Q. Pardon me?

A. He then reached into the car and removed the gun that he'd seen from outside.

Q. Officer, do you remember testifying in a Motion to Suppress on May 13, 1982, in the Kenton Circuit Court?

A. I remember. I don't remember the date for certain, but I remember.

Q. Do you remember testifying—this is on Page 19—"while I was doing that, Officer Rassache [8] stepped to the side just to my left inside the open door of the passenger side of the automobile and leaned in. When he leaned in,

the butt of the .32 caliber Harrington and Richardson revolver came into sight?"

A. That could have been my testimony. I don't recall word for word. If that's what's in the transcript then that's correct.

Q. Is that an accurate statement of what you said before?

A. That's just what I said. He stepped behind the two men which was inside the open door of the car and then the gun apparently came into view. He reached in and removed it.

Q. My understanding of this statement here is that it did not come into view until he leaned inside the car. Is that a fair reading of that statement?

A. You would have to ask Officer Rassache about that, I wouldn't know.

Q. As a result of finding that gun, you placed Mr. Green under arrest; is that correct?

A. That's correct.

Q. Did you have a warrant to search the car?

A. No.

Q. Did you have a warrant to arrest Mr. Hensley?

A. No.

[9] Q. Did you have a warrant to arrest Mr. Green?

A. No.

MR. SMITH: No further questions.

THE COURT: You may cross examine, Mr. Arehart:

CROSS EXAMINATION:
BY MR. AREHART

Q. Officer—

MR. SMITH: Your Honor, may I ask one more question?

THE COURT: Yes.

DIRECT EXAMINATION RESUMED:
BY MR. SMITH

Q. Was that gun that was first located in Mr. Green's possession—

A. Pardon me?

Q. Was that gun which was located under the front seat in Mr. Green's possession at anytime, if you know?

A. Only directly under the seat that he was sitting on.

Q. Was it in his possession to your knowledge?

MR. AREHART: Objection, Your Honor, that's a legal term.

THE COURT: Overruled. You may answer the question.

A. I didn't see it physically in his hand, no.

[10] RESUMPTION OF DIRECT EXAMINATION:
BY MR. SMITH

Q. To your knowledge, was it ever in his possession?

A. I have no knowledge of that. I don't know.

MR. SMITH: No further questions.

THE COURT: Mr. Arehart?

CROSS EXAMINATION:
BY MR. AREHART

Q. Officer Cope, I believe you have testified about three times previously in this matter, is that correct?

A. I believe so.

Q. As I take your testimony, on December 10th, six days prior to the stopping of Mr. Hensley, you received some type of communication from the St. Bernard Police Department in Ohio?

A. A flyer came from Cincinnati but it was for the Cincinnati/St. Bernard area.

Q. Would you look at what has been handed to you and tell the Court if that's the communication you all got from the St. Bernard Police Department and if so what date did you receive it and what does it say?

A. That is the flyer. It's dated December 10th and it would have been on our roll call that day. [11] Do you want me to read it?

Q. Yes.

A. It states, "Wanted for investigation only for aggravated robbery. Wanted for investigation of aggravated robbery which occurred at the Moon Tavern, 631 Vine St., St. Bernard, Ohio on December—" the date is obscured—"1981 at 6:19 AM is one Thomas Hensley. M/W-1/18/44 date of birth. It then gives a control number and a social security number. 6 ft., 190 lbs. Subject lka as of 12/7/81 was Drake Motel. If subject is located pick up and hold for St.

Bernard Police. Use caution and consider subject armed and dangerous." Then it repeats it again. I believe the second is identical to the first one.

Q. I believe that you previously testified that based upon this flyer or teletype or whatever you want to call it, you were advised that there would be a warrant following that up?

MR. SMITH: Objection. It's somewhat leading.

MR. AREHART: This is cross examination, Your Honor.

MR. SMITH: It's his witness.

THE COURT: Cross examination.

MR. SMITH: This witness is clearly [12] identified with the state and I don't think he's entitled to lead a police officer in a Motion to Suppress.

THE COURT: Overruled.

CROSS EXAMINATION RESUMED:
BY MR. AREHART

Q. What were you advised—what was your knowledge as to whether or not there would be a warrant coming based upon this flyer or communication?

A. We were advised to stop and hold if we located him and that a warrant was forthcoming; that this was notification to hold him if we came upon him before the warrant was issued.

Q. Did you know Tommy Hensley prior to this?

A. I had seen him but I did not personally know him.

Q. Did you know who he was by sight?

A. Yes, sir.

Q. Tell the Court on December 16, when you stopped Mr. Hensley's car how that happened—just how you came to stop the car—what information you received.

A. I received a radio transmission from Officer Eager advising that he had seen Mr. Hensley in a white Cadillac at Robbins and Madison; that the vehicle had turned down Robbins and down Scott and he had lost [13] the vehicle. He called the dispatcher and asked him to check and verify if there was a warrant pursuant to this.

Then Officer Rassache and I were speaking on our Channel 2, which is a car to car that does not go through the sta-

tion, about where the vehicle might go. He had locations in mind. He went to one location and I went to the other.

I went to the 18th and Holman and that's where they went. That was 1806 Holman. The vehicle approached my location and I made a u-turn and pulled in behind him and made the trafic stop.

Q. During the time that you had the first contact with Officer Eager and the time that you stopped Mr. Hensley, were you in communication with the dispatcher?

A. Yes, sir.

Q. And was she not in fact trying—did contact Cincinnati authorities trying to run down this warrant?

A. Yes, sir.

MR. SMITH: Objection.

THE COURT: Overruled.

RESUMPTION OF CROSS EXAMINATION:
BY MR. AREHART

Q. Was she able to determine before you came upon Mr. Hensley whether or not there was a warrant?

[14] A. No, sir.

Q. I believe you stopped Mr. Hensley and as you've testified here today, ordered him out of the car.

A. That's correct.

Q. Between December 10 and December 16, 1981, did you know or did your office make any determination to find out where Mr. Hensley was? There's been some indication here that there were two locations where he could possibly be.

A. That was Officer Rassache's personal knowledge of his hangouts or his friends. To my knowledge, no one knew where to find him before this.

Q. And the last known address, according to that communication, was the Drake Motel?

A. That's correct.

Q. Is that over in Cincinnati?

A. It's across the river. I believe it's in Cincinnati.

MR. AREHART: That's all I have of this Officer.

THE COURT: Redirect?

REDIRECT EXAMINATION:

BY MR. SMITH

Q. Officer, have you ever seen a flyer like this that says, Wanted for investigation only for aggravated [15] robbery?

A. Have I ever—

Q. Have you ever seen one like that before?

A. Yes, sir.

Q. How many times would you say?

A. Many, but I have no idea.

Q. Have you ever seen a flyer that said, Wanted for arrest or that there's a warrant out—how is that phrased in the flyer?

A. It would probably be the same other than a notation at the bottom that a warrant is on file.

Q. So if there's a warrant out, it will always say on the top, Wanted for investigation only.

A. It would probably say, Wanted for investigation of an armed robbery and at the bottom they would have that the warrant is on file.

Q. Does wanted for investigation only mean anything to you?

A. Just exactly what it says, sir, that they wanted us to stop and hold them for investigation of a robbery that occurred.

Q. Was this read to you every day at roll call?

A. Yes, sir.

Q. Was it the same every time?

A. It would be read straight off the paper so it would be.

[16] Q. So for six straight days it was read, Wanted for investigation only, is that right?

A. I would imagine so, yes, sir.

Q. And there was never any indication that a warrant had come out, is that right?

A. No one ever told us either way.

Q. Nobody ever told you that there was.

A. No.

Q. Did you go and attempt to find Thomas Hensley as a result of this flyer?

A. He was something that I looked for in my daily routine.

Q. Did you attempt to find out where he lived or where he stayed in Covington?

A. I made no attempt to do that.

Q. Did other police officers, to your knowledge?

A. Officer Rassache had been watching the two locations that he gave me.

Q. Do you know if Officer Rassache went to one of the addresses to see if he was there?

A. I would have no idea.

Q. Have you ever picked up anybody on a warrant or on a wanted for investigation only?

A. What do you mean by picked up?

Q. A flyer that—did you ever pick up anybody [17] during your police work on the basis of a flyer other that Mr. Green and Mr. Hensley—on the basis of a flyer that said, wanted for investigation only for some crime?

A. By picked up, do you mean arrest or stop?

Q. However you want to do it.

A. Well, it's your question. However you want to do it.

Q. Let's start with stop first.

A. Yes, I have.

Q. Have you ever arrested anybody on that?

A. On a flyer, no, sir.

Q. What did you do when you stopped the person?

A. Just exactly as I've said today, stopped and got them out. If it said they were armed and dangerous, I had them go into a safe position for me and called for a backup and had the station check on a warrant.

Q. Do you remember any of the cases where you did that?

THE COURT: I think we're getting a little far afield, Mr. Smith. Let's limit the testimony to this case. I'm really not concerned with what he did in other cases.

RESUMPTION OF REDIRECT EXAMINATION:
BY MR. SMITH.

Q. What were the instructions given to you when [18] this bulletin was read in roll call?

A. No, sir.

Q. It was just read as it stands here.

A. That's correct.

Q. And that's the sole basis for this stop, is that right?

A. That's correct.

MR. SMITH: No further questions.

THE COURT: Are you going to introduce this flyer, Mr. Arehart?

MR. AREHART: Your Honor, it's already been admitted in the codefendant Hensley's case. It's in the record.

THE COURT: All right. (To the witness) Thank you.

(Witness stands aside.)

THE COURT: Call your next witness, Mr. Smith.

MR. SMITH: Call Albert Green.

ALBERT GREEN, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows:

DIRECT EXAMINATION:
BY MR. SMITH

Q. State your name and address.

A. Albert Ray Green. 1054 Sunset Avenue, [19] Cincinnati, Ohio.

Q. Were you a passenger in a vehicle on December 16th, driven by Tommy Hensley?

A. Yes, I was.

Q. Was that vehicle forcibly stopped by Officer Cope who just testified?

A. Yes.

Q. And were you ordered out of the vehicle at gunpoint by Officer Cope?

A. Yes.

Q. Subsequent to that, was there a search conducted under the seat in which you had been seated?

A. There was a search of the car. I didn't see where they searched. I just know they searched the car.

Q. Did you feel that when you were riding as a passenger in that vehicle that you would be free from government intrusion?

A. Certainly.

Q. Did you feel that you would be free from a police officer pointing a gun at you and ordering you out of the car?

A. Certainly.

Q. Did you feel that you would be free from a search by the government of your vehicle or of the [20] vehicle in the immediate area in which you had been seated?

A. Certainly.

MR. SMITH: I have no further questions.

THE COURT: Cross examination, Mr. Arehart?

CROSS EXAMINATION:
BY MR. AREHART

Q. Mr. Green, first of all, how long had you been in that car?

A. About five minutes.

Q. How did you come to get in the car, were you a hitchhiker?

A. No. I was at a friend's house and Mr. Hensley brought a young lady there. I asked her to ask him if he would give me a lift home. I had just had my driver's license suspended and wasn't allowed to drive.

Q. So he was merely taking you from the party to your home?

A. That's exactly right.

Q. Did you own or did you have in your possession a .32 caliber revolver which was underneath the passenger's seat?

MR. SMITH: Objection, Your Honor. [21] I didn't go into the issue of possession on direct examination.

MR. AREHART: It's the standing issue, Your Honor.

MR. SMITH: Rule 104D states—of the Rules of Evidence—states that the accused does not by testifying upon a preliminary matter subject himself to cross examination of other issues in the case.

Rule 611D, cross examination should be limited to the subject matter of the direct examination and matters affecting credibility of the witnesses. I have not gone into the issue of possession and they have already accused him of possession—they have already accused him of possession.

That's established anyway. Aside from that—

THE COURT: State your position again, Mr. Arehart.

MR. AREHART: Your Honor, the question is whether or not he had any ownership or possessory interest in the

gun. The Supreme Court cases very distinctly say that he's got to show either ownership in the property seized or in the automobile.

He hasn't shown either and I think I have a right to show that to the Court, that this man has no standing.

[22] MR. SMITH: The element of possession is established by the charge. The issue of the ownership of the vehicle is another question and he's free to go into that.

THE COURT: The element of possession is not established by the charge. That's just an allegation. I will overrule your objection. I'll be very careful about how far the United States takes this at this time.

MR. AREHART: Well, Your Honor, we can't use what we get from here at the trial anyway. This is just for the Suppression Motion.

CROSS EXAMINATION RESUMED
BY MR. AREHART:

Q. Did you have any interest, ownership or possession or have any knoweldge of the .32 caliber Harrington and Richardson gun with the tape on the handle which was found underneath the seat where you were sitting?

A. I respectfully declined to answer that under the rights granted by the Fifth Amendment in that it may tend to incriminate me.

Q. Other than being a passenger for the purpose of getting a ride home, did you have any other interests in that automobile, such as were you an owner?

A. No, I wasn't.

[23] Q. When you got into the car, did you see the weapon underneath the seat?

A. No, sir.

MR. AREHART: No further questions.

THE COURT: Redirect?

MR. SMITH: Your Honor, we rest.

THE COURT: (To the witness) You may step down, Mr. Green.

MR. SMITH: I would move the gun that's not here into evidence.

THE COURT: All right. It's already in evidence in the companion Hensley case, so it's admitted in this case here. Very well, you have completed your evidence, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: Does the United States have any evidence?

MR. AREHART: First of all, Your Honor, I'd like to inquire of Mr. Smith if he still takes the position that he is not able to stipulate to any of the prior testimony and if not, I'll just have to call those officers.

MR. SMITH: Well—

MR. AREHART: They are here and if it's necessary, I'll put them on.

[24] MR. SMITH: I don't think it's necessary to go through all of it but there are certain things I'd like to go through. I don't want to take too much time going over things that have been gone over before, but there are some things I'd like to get straightened out.

THE COURT: Such as?

MR. SMITH: Well, I'd rather not go into it until they come up.

MR. AREHART: Your Honor, why don't I just call the witness and ask him if he adopts his prior testimony and if he has any cross, then he can go from there.

THE COURT: How many do you have?

MR. AREHART: I think there would be three—we don't have the tapes here. I got the word that he would be willing to stipulate to the radio transmissions so I don't have Schonaker here. I have Rassache and the two Officers from St. Bernard.

THE COURT: Well, if they are here go ahead and call them and have them adopt their testimony. Mr. Smith, if you want to cross examine any of these officers, now is the time to do it.

MR. AREHART: Your Honor, the United States calls David Rassache.

[25] DAVID RASSACHE, called as a witness on behalf of the Government, after first being duly sworn, testified as follows:

DIRECT EXAMINATION:
BY MR. AREHART

Q. Would you state your name, please.

A. I'm Specialist David Rassache of the Covington Police Department.

Q. Are you the same Officer Rassache who testified previously here—I believe twice on the Suppression Hearing of codefendant Hensley?

A. Yes, sir.

Q. And you're the same Officer who testified in a Suppression Hearing in a state hearing concerning the same matter?

A. Yes, sir.

Q. Officer, have you had an opportunity to see your testimony or read the transcript of those prior hearings?

A. Yes, sir.

Q. Do you adopt that testimony as being true and accurate?

A. Yes, sir, I do.

MR. AREHART: That's all the questions I have at this time.

THE COURT: Cross examination.

[26]CROSS EXAMINATION:
BY MR. SMITH

Q. Officer—

MR. AREHART: Your Honor, pardon me but I do have one other matter.

THE COURT: Go ahead, Mr. Arehart.

MR. AREHART: For the purposes of this hearing, I would introduce a copy of the transcripts and I would introduce those since he is not testifying.

MR. SMITH: That's fine with me.

THE COURT: Very well, they will be received.

CROSS EXAMINATION:
BY MR. SMITH

Q. Officer, you are familiar with the bulletin also; isn't that correct?

A. Yes, sir.

Q. You know what bulletin we're talking about. It says, wanted for investigation only.

A. Yes, sir.

MR. SMITH: Your Honor, may I inquire if that is in evidence at this point? Has that been stipulated as a joint exhibit?

THE COURT: I believe it was introduced in the Hensley hearing.

MR. AREHART: It's in the record.

[27]CROSS EXAMINATION RESUMED:
BY MR. SMITH

Q. This started to come out and it was read at roll call every day from December 10 through December 16; is that right?

A. Yes, sir, I believe so.

Q. So you heard it approximately six times?

A. I heard it a few times. I couldn't state that it was six times.

Q. Did you know where Tommy Hensley stayed?

A. I didn't know exactly where he stayed. I knew the places that he frequented.

Q. Well, you knew enough that you could say 1806 Holman Street on the tape, right?

A. Yes, sir. I stated that he visited there and was seen there several times.

Q. You knew that address?

A. Yes, sir.

Q. Did you ever go to that address on December 10th to look for Hensley?

A. No, sir.

Q. Did you go there on December 12th?

A. No, sir.

Q. 13th?

A. No, sir.

Q. 14th?

[28] A. No, sir.

Q. 15th?

A. No, sir.

Q. 16th?

A. No, sir.

Q. Did you have another address for him, Trevor Street?

A. I believe 118 Trevor.

Q. Did you go there on any of those days, 10th through 16th of December of 1981?

A. No, sir, I don't ride that side of town.

Q. To your knowledge, did anyone go to look for Tom Hensley at those two addresses from the 10th through the 16th?

A. No one went to the addresses. We drove by several times looking for him but we never did go to the houses themselves.

Q. Did you drive by looking for him?

A. Yes, sir.

Q. What were you looking for?

A. Him, himself.

Q. Were you looking for him outside the building?

A. Yes, sir.

Q. Why not inside the building?

A. I was advised not to go inside the house looking [29] for him.

Q. Who advised you to do that?

A. Our superiors.

Q. Why?

A. His address is not listed as that location but that he had just visited there. It belonged to people by the name of Goins.

Q. Pardon?

A. People by the name of Goins lived there and we were advised not to go to that house but just to frequent the area and see if we could locate.

Q. I'm not sure I understand. What difference does it make whether the apartment was owned by someone else. Why did that affect your decision about whether to go there?

A. There was an investigation going on at the time.

Q. Of whom?

A. The people that lived at that address.

Q. What did you intend to do—you drove by looking for Hensley though, is that right?

A. Yes, sir.
Q. How many times did you do that?
A. I have no idea.
Q. Did you do it on the 10th when you first heard about the flyer?
[30] A. Yes, sir.
Q. Did you do it on the 11th?
A. I don't recall.
Q. 12th?
A. I don't recall.
Q. Approximately how many times did you drive by one of these locations where you thought he might be?
A. Several times.
Q. What did you intend to do when you saw him?
A. Stop and hold for investigation.
Q. That would be at the request of the St. Bernard Police Department; is that right?
A. Yes, sir.
Q. I take it then you would notify them and they would come down to Kentucky to talk to him.
A. Yes, sir.
Q. Was it your intention to keep him there on the street or take him back to the station while waiting for them to come down?
MR. AREHART: If Your Honor please, I would object to this man's intentions. He didn't stop him. Officer Cope stopped him and it's what Officer Cope did at the time.
MR. SMITH: It was a joint police effort. They're all doing it for the same reason.
[31] THE COURT: I'll give you a little leeway, Mr. Smith, but let's try to pinpoint this thing—
MR. SMITH: I'm trying to, Your Honor—
THE COURT: Pinpoint it to the time of the arrest.
MR. SMITH: Well, I'm talking about the—whether there's an arrest or not, it goes to the intention of the officer. That's part of the basis or one of the factors to determine whether there was an arrest or not.
THE COURT: Objection overruled at this time.
RESUMPTION OF CROSS EXAMINATION
BY MR. SMITH:

Q. Have you ever picked up someone who was wanted for investigation only before?
A. Yes, sir.
Q. Did you hold them for police officers in Cincinnati to come down?
A. I don't believe I've ever held anyone for Cincinnati.
Q. Have you held them for other police departments?
A. Yes, sir.
Q. Approximately how long have you held someone for that purpose?
[32] A. 30 minutes.
Q. Approximately how long do you think it would have taken the St. Bernard Police to come down to pick up Mr. Hensley?
A. I have no idea.
Q. At least 30 minutes; wouldn't that be fair?
A. Yes, sir.
Q. Was it your intention to take him down and hold him at the police station?
A. Yes, sir.
Q. Was that your intention on December 16th, 1981?
A. Yes, sir.
Q. So your intention was not to stop him just to look for a warrant?
A. Stop him and hold him—
MR. AREHART: Your Honor, I would make the same objection. This man didn't stop him.
THE COURT: All right.
MR. AREHART: Your Honor, Officer Cope testified that he stopped him to check on a warrant.
THE COURT: Objection sustained.
RESUMPTION OF CROSS EXAMINATION:
BY MR. SMITH
Q. Were you and Officer Cope acting in concert; were you acting together?
[33] A. He was there before I was.
Q. You were in communication with each other; is that right?
A. Yes.
Q. Who was superior, you or Officer Cope?

A. Superior to what?
Q. Who had the higher ranking?
A. I did.
Q. What did you intend to do with Mr. Hensley on the 16th?
A. Stop and detain.
Q. And wait for the St. Bernard Police to come down?
A. At that time, I wasn't aware that it was the St. Bernard Police. I was just aware of the Cincinnati Police.
Q. All right. You were going to wait for police officers to come from another jurisdiction?
A. Yes, sir.
Q. And you were going to hold Mr. Hensley until that time?
A. Yes, sir.
Q. So Officer Cope's belief as to what was going to happen—you would have overruled him, is that fair to say?
[34] A. No, sir, I wouldn't. He was the first officer on the scene.
Q. But what would have been done is what you've testified to here today?
A. Yes, sir.
MR. SMITH: No further questions.
THE COURT: Anything further?
MR. AREHART: No further questions.
THE COURT: Call you next witness, Mr. Arehart.
(Witness stands aside.)
MR. AREHART: Your Honor, the United States calls Ken Davis.

KENNETH DAVIS, called as a witness on behalf of the government, after first being duly sworn, testified as follows:

DIRECT EXAMINATION:
BY MR. AREHART

Q. Will you state your name for the record.
A. Kenneth Davis.
Q. How are you employed?
A. Police Officer.
Q. Where?

A. St. Bernard.
Q. And that's in the State of Ohio?
[35] A. Yes, sir, it is.
Q. Officer Davis, are you the same Kenneth Davis that testified here previously in the Suppression Hearing of the codefendant, Tommy Hensley?
A. Yes, sir.
Q. I believe at that time you introduced two documents, one being a teletype that you or your office sent out on December 10 concerning Thomas Hensley?
A. Yes, sir, I did.
Q. I believe you also introduced a copy of a statement you received from one Janie Hansford concerning the statement involving the robbery of the Moon Tavern on December 4, 1981.
A. Yes, sir, I did.
Q. Officer, do you adopt as true and accurate your testimony from that prior hearing?
A. Yes, sir, I do.
MR. AREHART: No further questions.
THE COURT: Cross examination.

CROSS EXAMINATION BY:
MR. SMITH

Q. Officer Davis, why did you go talk to Janie Hansford?
A. I was told by a Cincinnati Officer that she had information involving the robbery at the Moon Tavern.
[36] MR. SMITH: Your Honor, I've never received a copy of her statement. Could I see a copy of that?
MR. AREHART: It's in the record.
THE COURT: Who is this?
MR. SMITH: Your Honor, I asked the Clerk's Office if I could see a copy before and they said it wasn't in the jacket.
MR. AREHART: Well, we introduced it at the last hearing.
THE WITNESS: I have the original here.
MR. AREHART: I've got a copy right here. I've marked on it but I'll be glad to let you use it.
THE COURT: Whose statement is this?

THE WITNESS: Janie Hansford.

MR. AREHART: Since you weren't present at this last hearing, Your Honor, this statement was introduced as the basis for the flyer. The information in this statement indicates that Mr. Hensley was the driver of the getaway car and that's why the flyer was introduced.

RESUMPTION OF CROSS EXAMINATION
BY MR. SMITH:

Q. Go ahead and read that into the record.

THE COURT: Wait just a minute. You are referring to the voluntary statement dated 12-10-81 [37] of Janie Hansford?

MR. SMITH: That's correct, Your Honor.

THE COURT: All right. This is a three page statement which has previously been received in evidence?

MR. AREHART: Yes, it has, Your Honor.

THE COURT: There's no need for him to read it. I can read this. You can ask him any questions you want to about it.

MR. SMITH: I haven't read this yet. I wasn't able to locate this and I wasn't given a copy of it.

RESUMPTION OF CROSS EXAMINATION:
BY MR. SMITH

Q. You advised Janie Hansford of her rights before she gave this statement?

A. Yes, I did.

Q. Did you also tell her that you would not prosecute her for anything that she said?

A. No, I did not.

Q. Did you offer any inducement at all to get her to make this statement?

A. No, I did not

Q. And she told you that she went to a bar with her boyfriend, Allen Pfeifer; is that right?

A. Yes.

[38] Q. And she told you that he asked a woman when they opened there?

A. Could you repeat that statement?

Q. She told you that he, Allen, her boyfriend asked someone who worked there what time the bar opened?

A. One of the two of them asked. I don't—referring back to the statement—one of them asked what time the bar did open, yes.

Q. Well, could you read the statement and then say which one asked?

A. Okay.

Q. I will direct your attention to the fourth line down.

A. Yes, I'm reading it. Allen.

Q. Allen asked that?

A. Yes.

Q. And she said subsequent to that, Allen received a phone call from his father; is that right?

A. Yes, approximately at 3 o'clock in the morning.

Q. And Allen had a discussion with his father; is that right?

A. Yes.

Q. And Allen, her boyfriend, relayed some of that discussion to her?

A. In reference to what.

[39] Q. In reference to the conversation between Allen and his father.

A. At 3 o'clock in the morning, yes.

Q. So, she never talked directly to Sonny—Allen's father; is that right?

A. She did the next day.

Q. Is there anywhere in that statement that indicates that she participated in the robbery in any way?

A. The only thing that I can tell you is that she knew—had knowledge of the robbery at the time before it was set up for the simple reason that she was advised at 3 o'clock in the morning and the robbery didn't take place until 6:30.

THE COURT: Mr. Smith, I'm going to make a statement to you. The purpose of this hearing is to determine whether or not the weapons should be suppressed. I have already made a determination in the Hensley case which is the same case as this case that there was probable cause based upon that flyer to stop the automobile.

I believe Judge Bertelsman has affirmed that finding that—

MR. SMITH: I think you're wrong on that point and let me explain why I think you're wrong. It's my understanding that the reason he found probable [40] cause was not just because of the flyers because the basis of the flyer—and at the time you had your hearing the basis had not been established yet. So, that was the reason for some of these subsequent hearings to establish the basis for this.

THE COURT: I understand that.

MR. SMITH: So, if there's no basis for the flyer, there's no probable cause to stop.

THE C URT: I just said that there has been a basis established. It was determined in the Hensley case that there was probable cause.

MR. SMITH: Well, my reading of the statement is different from the findings of fact of Judge Bertelsman so I'd like to clarify this. I think there's some misunderstanding in the transcript.

MR. AREHART: If Your Honor please, the Judge has already ruled. Now, if he's got an argument to make then that's fine. He can write a 30 page memorandum challenging the Judge's findings but—

MR. SMITH: I'm entitled to go in and have my own Suppression Motion it seems to me. I'm here to cross examine a witness and he's just put in a transcript here and I'm allowed to go over that.

THE COURT: I'm giving you every opportunity to do that, but I'm telling you that the [41] stop of the automobile has been determined as being a valid stop already. I assume that's what you're getting at now, correct?—Whether or not the officers, based upon this flyer had sufficient—

MR. SMITH: I'm trying to determine the basis of the flyer.

THE COURT: And I'm saying to you that that has already been ruled on as a matter of law.

MR. SMITH: And I'm saying that that has been ruled on because of a misunderstanding of the facts of the case and that's what I'm trying to get into in the cross examination.

THE COURT: I'm not going to let you go much further with this. You go ahead and ask him your questions, but I think if you would—if you had reviewed Judge Bertelsman's findings of fact yesterday before you came to Court, you would have known this.

You said to me yesterday that you did not know that he had made any findings of fact.

MR. SMITH: I didn't know until I came into Court that a ruling had been handed down in Mr. Hensley's case. I didn't know that until right toward the end of the hearing that we had yesterday.

THE COURT: All right. Proceed with [42] your questions.

RESUMPTION OF CROSS EXAMINATION:
BY MR. SMITH

Q. Did Janie Hansford indicate that she had participated in the robbery?

A. She advised me that she had knowledge of it prior to the aggravated robbery going down.

Q. Did she advise you that she participated in it?

A. The statement that she gave to me was that they—Allen Pfeifer—who is Sonny's son asked her to go to the Moon Tavern with him to find out what time that the Moon Tavern opened.

Q. Is that what her statement says here?

A. It says that he asked her to go and have a few drinks.

Q. And that wasn't to find out the time?

A. No, not according to the statement. There was an oral interview though at the time that she was doing this statement.

Q. She also said that she didn't know there was going to be a robbery until that phone call at 3 o'clock; isn't that right?

A. Correct.

Q. So when she went to the tavern, she was not aware—whatever her participation was it was not [43] for a crime.

A. She was not aware at that time to my knowledge.

Q. On the basis of that statement, you issued a flyer for investigation only; is that right?

A. Yes.

Q. And at that point, you felt—you had more than a suspicion let's say, but you had less than probable cause to get a warrant; is that fair to say?

A. At that particular time—

Q. You felt some more investigation was needed?

A. At that particular time I would say I wanted to talk to him basically.

Q. You're not sure.

A. At that particular time, I wanted to talk to him.

Q. So therefore you issued a warrant for investigation only?

A. Correct.

Q. And you didn't go get a warrant for his arrest at that time—not until much later; is that right?

A. No, not at that time.

Q. What did you expect to happen when you put out this flyer for wanted for investigation only?

A. What did I expect—

Q. Yes, what did you expect the results to be?

[44] A. For somebody to stop him.

Q. And do what?

A. And hold him for investigation for us.

Q. And arrest him, right?

A. To detain him.

Q. Arrest him?

A. To detain him for us for investigation so we could talk to him—to advise him that we did want to talk to him.

Q. Do you remember testifying at the last hearing?

A. Yes.

Q. Do you remember being asked this question—on page 16—do you remember being asked: Question: "so when you issued it you were issuing it for the purpose of arresting Mr. Hensley; is that correct? Answer: That's correct."

Now, was that your testimony?

A. Yes, it was.

Q. Is it still your testimony today?

A. Yes, it is.

MR. SMITH: I have no further questions.

THE COURT: Redirect, Mr. Arehart?

MR. AREHART: I have no further questions.

THE COURT: (To the witness) You may step down, Officer.

(Witness stands aside.)

[45] THE COURT: Call you next witness, Mr. Arehart.

MR. AREHART: Your Honor, I have no further witnesses.

THE COURT: Anything further, Mr. Smith?

MR. SMITH: Nothing further.

THE COURT: Have you both submitted—the United States has submitted a memorandum of law—

MR. AREHART: I have submitted one, Your Honor, and I would like to add one brief thing. Concerning the standing issue, we would like, of course, reraise that. I think the defendant has totally collapsed on his attempt to establish standing and if Mr. Smith had read the cases I cited to the Court, they would have shown him that he has to show either a possessory interest in the car or an ownership interest in the car and the mere fact that he's a passenger at the invitation of the owner of the car does not establish automatic standing.

There is no more automatic standing. *Rakas* is right on point. It says that a passenger in a car who was legitimately in that car does not have a legitimate expectation of privacy to the area under the seat. That's right on point.

[46] He has in no way established that he had an expectation of privacy underneath that seat. His subjective feelings are irrelevant. It's a legitimate expectation of privacy that society is ready to accept and I would move to deny his motion solely on that basis.

THE COURT: Mr. Smith?

MR. SMITH: Your Honor, in *Rakas* v. *Illinois* which is the case he's relying upon, the defendant was charged—the defendants were charged with aggravated robbery. Part of the evidence used in that case was a gun found in the vehicle and some shells found in the glove compartment.

They were not charged with possession of the gun or possession of the shells. The gun and the shells were merely evidence. They denied in their Motion to Suppress any possessory interests in the gun which was not alleged by the State and they denied any ownership of the car and there was no evidence of any expectation of privacy shown in their testimony in the Motion to Suppress.

The defendants in that case asked the Court to remand the case back to the trial court to determine that issue. The Court said they had their chance and it was not going to remand it.

[47] Shortly thereafter, the Court decided the case of *Delaware* v. *Prouse*. In that case, a passenger in a vehicle was charged with possession of marijuana which was found inside the vehicle and not on his person. An illegal stop was conducted by the police department and the Supreme Court of the United States after *Rakas* v. *Illinois* affirmed—discharged the defendant and said that the evidence should have been suppressed and the issue of standing was not even raised in that case.

Taken together, I think it's pretty clear that where the state alleges a possessory interest that the possession is established automatically.

The next step to go to is whether there was an expectation of privacy in that area. We've put on testimony here today that Mr. Green had an expectation of privacy and felt that he would be free from government intrusion while he was a passenger in the car and he also felt that the immediate area around his person would be free from government intrusion.

Therefore, we've established the two points which were required by *Rakas* and the following cases of *Salvucci* and *Rawlings*.

THE COURT: Thank you. I will prepare [48] the findings of fact on this. You have a November 2nd trial date?

MR. AREHART: I believe it's November the 4th, Your Honor.

THE COURT: Very well. I'll have some findings of fact ready by early next week.

MR. SMITH: Your Honor, if I may say one thing—in Judge Bertelsman's findings of fact he found that the basis for the flyer was—there was probable cause for the issuance of the flyer because there was an exception to all of the hearsay—specifically, that Ms. Hansford admitted involvement in the robbery and therefore her statement, although an informant's statement, was reliable because she was admitting a crime and therefore it was against her interest.

I think we've established in this hearing that she did not admit involvement in a crime and therefore that link in the chain has been broken.

THE COURT: Very well, gentlemen, thank you.

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And these are all the proceedings had and reported upon this case this date.

Supreme Court of the United States

No. 93-1339

UNITED STATES, PETITIONER,

v.

THOMAS J. HENSLEY

ORDER ALLOWING CERTIORARI. *Filed May 31, 1994.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Sixth Circuit* is granted.

PETITIONER'S

BRIEF

No. 83-1339

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether *Terry* stops (*Terry* v. *Ohio*, 392 U.S. 1 (1968)) may be made only when the police reasonably suspect that a crime is about to be committed or is ongoing at the moment of the stop, or whether such stops may also encompass situations in which the police reasonably suspect that the person to be stopped has committed a completed crime.

2. Whether a "wanted flyer" issued by one police department provides an officer of another department with reasonable suspicion sufficient to justify a brief stop of the suspect while an effort is made to ascertain whether an arrest warrant has been issued for the suspect.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1330

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 713 F.2d 220. The order of the district court (Pet. App. 12a-15a) and the recommendation of the magistrate (Pet. App. 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on August 9, 1983. A petition for rehearing was denied on December 15, 1983 (Pet. App. 11a). The petition for a writ of certiorari was filed on February 10, 1984, and was granted on May 21, 1984 (J.A. 140). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Eastern District of

Kentucky, respondent was found guilty of being a convicted felon in possession of firearms, in violation of 18 U.S.C. App. 1202(a)(1). Respondent was sentenced to two years' imprisonment. The court of appeals reversed the conviction (Pet. App. 1a-9a).

1. a. On December 4, 1981, two armed men robbed the Moon Tavern in St. Bernard, Ohio (J.A. 92-93).[1] On December 10, 1981, Officer Kenneth Davis of the St. Bernard Police Department interviewed a woman by the name of Janie Hansford. After advising Hansford of her rights, Officer Davis obtained from her a detailed, handwritten statement in which she implicated herself in the robbery and identified respondent as the driver of the getaway car (J.A. 92-96).[2] Officer Davis had had prior contact with respondent and considered him to be armed and dangerous (J.A. 97).

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[1] The facts are taken from the transcripts of the hearing on respondent's motion to suppress. The suppression hearing was initially held before a magistrate on September 21, 1982. Further hearings were held before the district court on September 29 and October 4, 1982. In addition, a suppression hearing was held on May 13, 1982, in the case of *Commonwealth of Kentucky* v. *Hensley*, No. 82-CR-5 (Kenton County Cir. Ct.). That hearing followed the Commonwealth's initiation of charges against respondent for possession of a handgun by a convicted felon, in violation of Ky. Rev. Stat. § 527.040 (1975). Those charges were dismissed after the state court granted respondent's motion to suppress. (The record does not reveal the basis for the state court's decision. At the suppression hearing itself, the state court seemed to indicate an intention to rule for the prosecution (J.A. 58).) The transcript of the state court suppression hearing was made a part of the record of the federal proceedings (see Pet. App. 16a; J.A. 56).

[2] Respondent disputes our contention that Hansford implicated herself in the robbery (Br. in Opp. 3 n.4). While it is true that the record contains no evidence of her direct participation in the robbery, it does show that she assisted in the plans for the robbery. See J.A. 95-96, 133. Moreover, even respondent acknowledges that Hansford knew about the robbery 3½ hours before it occurred (Br. in Opp. 3 n.4; see also J.A. 133).

On the basis of his knowledge of the robbery, Hansford's statement, and his prior knowledge of respondent, Officer Davis immediately issued the following communication for transmission to neighboring police departments (Pet. App. 2a n.1):

> "Wanted for Investigation Only for Aggravated Robbery"
>
> Wanted for Investigation of Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:19 a.m., is one Thomas James Hensley. M/W—1/18/44, CTL No. 21528, PICA #325, SS—295388974, SFF, 195 lbs. Subject LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.

b. The above-quoted communication was sent out by teletype on December 10, 1981, received by the Covington, Kentucky police department on that date, and read aloud at roll call each day at every change of shift from that date until December 16, 1981 (J.A. 21, 31, 33, 91, 98-99). The teletype was never cancelled or withdrawn (J.A. 91). Covington Police Officers Daniel Cope and David Rauche both had seen the teletype and had had it read to them (J.A. 91, 98-99). Based on their experience as police officers, both were of the opinion that this type of "flyer" was reliable and usually was followed by an arrest warrant (J.A. 22, 33). Officer Cope testified that "[w]e had been advised from Cincinnati that a warrant was forthcoming" (J.A. 74).[3] (Respondent was eventually arrested pursuant to a warrant and charged with complicity in an aggravated robbery

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[3] St. Bernard, Ohio, is a suburb of Cincinnati, as is Covington, Kentucky. Throughout the record in this case, Cincinnati and St. Bernard appear to have been referenced interchangeably.

robbery. (J.A. 94).[4] The Covington officers knew respondent and knew where he occasionally stayed, but they had been unable to locate him prior to December 16, 1961 (J.A. 31-32, 73, 77, 91, 99-100). Officer Rassche knew that respondent was a convicted felon (J.A. 39). Based on prior police contact, the Covington officers also believed respondent to be armed and dangerous (J.A. 79).

c. On December 16, 1961, a third Covington officer, Officer Terence Eger, came upon respondent and one Albert Green. The two were sitting in a parked automobile (J.A. 40-41), but upon seeing Officer Eger they "took off" (J.A. 60). Officer Eger radioed Covington police headquarters; set forth below are the pertinent portions of the radio transmission (J.A. 60-62)[5]:

[Officer Eger]:	606.
Dispatcher:	606.
[Officer Eger]:	Concerning a warrant on Tommie Hensley or Al Thomas. They just saw me at the 800 block of Madison and took off.
[Officer Rassche]:	Car 12 to 606. There's supposed to be a robbery warrant out of Ohio.
[Officer Eger]:	Repeat.

[4] Although respondent was bound over for indictment after a state court probable cause hearing, the case was never presented to the grand jury because Janie Hansford failed to appear on the date she was scheduled to testify. We are advised that the state issued a material witness warrant for Hansford, but she was never located.

[5] In the transmission, Albert Green is erroneously referred to as Al Thomas. The transmission includes Officer Eger's communications with the Covington dispatcher, car-to-car communications among Officers Eger, Rassche, and Cope, and the Covington dispatcher's communications with the Cincinnati Police Department.

[Officer Cope]:	There's possibly a robbery warrant out of Ohio for that subject.
[Officer Eger]:	Which one, Thomas or Hensley?
[Officer Cope]:	Hensley, Thomas Hensley.
	• • • • •
Dispatcher:	606, can you identify the vehicle?
[Officer Eger]:	White over white Cadillac El Dorado, I believe.
	• • • • •
[Officer Rassche]:	They will probably go to Trevor Street or 806 Holman.
	• • • • •
[Officer Rassche]:	Have you confirmed the warrant?
Dispatcher:	There's nothing local on either one. I need them stopped for information to run a NCIC check.
[Officer Rassche]:	Okay. You might check with the detective bureau. They put a flyer on Hensley on roll call about a week ago or so in reference to a Cincinnati robbery one.
Dispatcher:	Okay. I'll see what I can find.
[Detective Hanlon]:	Crime Bureau, Detective Hanlon speaking.
Dispatcher:	• • • On Tommie Hensley, do we have a robbery warrant out of Ohio on him?
Det. Hanlon:	I don't know whether they did or not, Ma'am.
	• • • • •

Dispatcher: • • • I believe there was something put on roll call a while ago. Never mind. I will check it. Okay.

• • • • •

[Officer Cope]: I have a white convertible Cadillac approaching 18th on Holman at this time. I will be checking to see the subjects, two subjects in front.

• • • • •

Dispatcher: This is the Covington Police Department. We had something—reference to a Thomas Hensley on roll call about a week ago. I believe it was a robbery warrant from Cincinnati. Is there any way you can check on that without a date of birth on him?

Female Voice: Where are you calling from?

Dispatcher: Covington Police Department. Isn't this Cincinnati Records?

Female Voice: Yes, it is. Let me transfer you to 3567. Hold on.

• • • • •

[Office Cope]: 121, I am at 15th and Holman at this time.

Dispatcher: 10-4. 121—we have not confirmed the warrant as of yet. I have Cincinnati hunting for the warrant.

Yes, ma'am. 10-4. This is Covington Police Department. About a week ago we had something reference a Tommie Hensley on roll call.

We can't find it now. I believe there is a robbery warrant out of Cincinnati.

Is there any way you can—

Female Voice: Well, I can't give you any information, but I can transfer you downstairs and—

Dispatcher: Never mind, never mind, thank you.

By this time, Officer Cope had arrived at the vehicle's location. He stopped the vehicle and ordered respondent and Albert Green out of the car (J.A. 78). Officer Cope stopped the vehicle for the sole purpose of detaining respondent briefly while attempting to determine whether a warrant had been issued for his arrest (J.A. 74-75). If there had been no warrant, Officer Cope would have let respondent go on his way (J.A. 75). Officer Cope did not stop respondent's vehicle with any intent to search the vehicle, to arrest respondent, or to question him (J.A. 27-28, 75).

Officer Cope "felt that [his] life was in jeopardy at the time of the stop" (J.A. 78, 79), and he took no action until back-up units arrived. Officer Rasche was the first to reach the scene. As he was looking straight into respondent's car, the door of which was open, Officer Rasche saw a gun protruding from under the passenger seat (J.A. 30, 34-35, 80, 83). Because Albert Green had been sitting in the passenger seat, he was arrested for carrying a concealed weapon (J.A. 35, 82).* "Immediately after finding [the first] gun," the officers searched a jacket lying between the two front seats and an open gym bag on the back seat "[f]or other weapons" *(ibid.)*. One handgun was found wrapped inside the jacket, and another was found in the gym bag (J.A.

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* After respondent admitted owning all of the guns discovered in the car, the United States moved to dismiss the indictment against Green, and the district court granted the motion.

24-25, 30). All three guns were loaded (J.A. 24). The gym bag also contained hypodermic needles, several ski masks, a change of clothes, and a controlled substance (*ibid.*). Respondent, who owned the car and had been driving it, was then arrested for carrying two concealed weapons (J.A 35, 37).

2. Prior to trial, respondent moved to suppress all evidence arising out of the search of his vehicle. Adopting the recommendation of the magistrate (Pet. App. 16a-21a), the district court denied respondent's suppression motion. The district court ruled (*id.* at 14a-15a):

> The St. Bernard Police were justified in issuing the teletype and Officer Cope was justified in stopping [respondent]. Once stopped, the officers could ask the men to step out of the car. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Having observed a weapon in plain view, the officers were justified in seizing the weapon and in searching further for weapons that might be accessible to the two men. • • • The discovery of the weapons gave the officers probable cause to arrest [respondent]. *Adams* v. *Williams*, 407 U.S. 143 (1972).

3. The court of appeals reversed, holding that respondent had been illegally arrested. The court held that the Covington police were not justified in making a *Terry* stop of respondent, reasoning that this Court has manifested a "clear intention to restrict investigative stops to settings involving the investigation of *ongoing* crimes" (Pet. App. 8a-9a (emphasis added)) and observing that "the government has not shown us any • • • 'exigent circumstances' that would have justified the Covington police in stopping [respondent]" (*id.* at 8a). The court of appeals summarized its holding as follows (*id.* at 9a):

> [W]e refuse to expand the *Terry* doctrine to encompass police attempts to round up people against whom arrest warrants may have been issued. This

"arrest now, verify warrant later" policy that the government urges us to uphold simply stretches the constraints of the Fourth Amendment beyond all reasonable limits.

In conclusion, we hold that the Fourth Amendment does not permit police officers in one department to seize a person simply because a neighboring police department has circulated a flyer reflecting the desire to question that individual about some criminal investigation that does not involve the arresting officers or their department.[*]

SUMMARY OF ARGUMENT

The court of appeals' conclusion that the stop in this case violated respondent's Fourth Amendment rights apparently rested on two theories: first, that the officers had to have a basis to suspect respondent of being engaged in criminal activity at the time of the stop itself; and second, that the flyer issued by the St. Bernard Police Department did not provide Covington Officer Cope with "'specific and articulable facts' that would have justified the stop" (Pet. App. 8a). The court was patently wrong on both counts, and its decision conflicts with numerous decisions of this Court and of other courts of appeals.

Moreover, the decision threatens to have serious and widespread practical consequences for effective law enforcement. First, the apprehension of persons suspected of having committed "completed" crimes is no less important than the apprehension of persons suspected of engaging in ongoing criminal activity; yet the

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[*] The court also refused to apply the "collective knowledge" doctrine in this case, holding that even if the St. Bernard Police Department had probable cause to arrest respondent, that knowledge could not be imputed to the Covington police because the two departments were not working directly together on the investigation (Pet. App. 4a-5a). We have not sought review of this aspect of the court of appeals' decision.

court of appeals' decision would require officers simply to turn their backs on those suspects who manage to conclude their criminal activity before they are caught. Second, as the cases cited at pages 18-19, *infra*, demonstrate, the practice of making investigative stops on the basis of "wanted" flyers is quite common, but the decision below would bring a virtual halt to interdepartmental cooperation. The court of appeals gave no reasoned justification for invalidating a long-standing and effective method of cooperation among police departments of different jurisdictions, and its error should be corrected.*

I. The court of appeals' decision that investigative stops are permissible only in "settings involving the investigation of ongoing crimes" (Pet. App. 8a-9a) ignores an entire line of this Court's post-*Terry* cases expressly stating that law enforcement officers may make investigative stops based on reasonable suspicion of past criminal activity. See, *e.g.*, *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 6; *Michigan* v. *Summers*, 452 U.S. 692, 699 n.9 (1981); *United States* v. *Cortez*, 449 U.S. 411, 417 n.2 (1981). *Terry* and its progeny rest not on a temporal analysis but on a balancing of the "limited intrusions on the personal security of those detained" against the "substantial law enforcement interests" advanced by permitting such detentions. *Michigan* v. *Summers*, 452 U.S. at 699. Here, the law enforcement interests advanced by the brief detention of a suspect wanted in connection with an armed robbery are clearly substantial. And, on the other side of the balance, the interference with respondent's liberty could not have been more limited. Officer Cope testified that he intended to detain respondent only long enough to determine whether there was an outstanding warrant for his arrest; had there been none (and had independent probable cause to arrest respondent not developed through the discovery of the guns), respondent would have been released. In these circumstances, it would have been poor police work indeed had the Covington officers simply shrugged their shoulders and allowed a suspected criminal to escape. See *Adams* v. *Williams*, 407 U.S. 143, 145 (1972). Moreover, the likelihood that, absent the stop, respondent would indeed have fled clearly supplied the "exigent circumstances" that the court of appeals erroneously held to be lacking (Pet. App. 8a). See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 7.

II. The court of appeals clearly erred in holding that the information contained in the "wanted" flyer was inadequate to provide Officer Cope with a sufficient basis upon which to stop respondent. It is well established that an officer may make an investigative stop or an arrest in reliance on a police wanted bulletin even though he has no personal knowledge of the facts warranting such action; the government need show only that the of-

* The decision below already has produced adverse practical consequences. We are advised by the United States Attorney for the Eastern District of Kentucky that the police departments of Kenton County, Boone County, Covington, Erlanger, and Florence (all located in Kentucky) have ceased making investigative stops on the basis of other departments' "wanted" flyers as a result of the decision below; in the past, these police departments each made an average of four or five such stops each month. Several months ago, the Hamilton County (Ohio) Police Chiefs Association met in Cincinnati to discuss the impact of the court of appeals' decision on police practices within their departments. Presumably, other police departments within the Sixth Circuit have responded in similar fashion. According to a local newspaper, Covington Police Captain Paul Elbert, Sr. has noted that this Court's decision will affect "whether police will be allowed to do their job and to fulfill obligations. * * * [An affirmance of the court of appeals' decision] would isolate law enforcement to their own humiliation. That isolation would produce safe havens for criminals and would build impenetrable barriers between jurisdictions," he said. The Kentucky Enquirer, May 22, 1984, at A-10, col. 1.

ficer initiating the chain of communication had sufficient information to constitute reasonable suspicion or probable cause. See *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971), and cases cited at pages 18-19, *infra*. The practical basis for this rule is clear: given the ease with which criminal offenders may move from one jurisdiction to another, effective law enforcement would be impossible if police officers had to cross-examine their fellow officers or those of another department before taking necessarily swift action. Certainly, nothing in the Fourth Amendment was intended to prohibit interdepartmental cooperation of the sort at issue in this case.

ARGUMENT

I

THE POLICE MAY BRIEFLY DETAIN A PERSON WHO THEY REASONABLY SUSPECT IS WANTED IN CONNECTION WITH PAST CRIMINAL ACTIVITY

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that law enforcement officers may stop a person and briefly detain him for questioning upon reasonable suspicion that he is connected with criminal activity. See also, *e.g.*, *Michigan* v. *Summers*, 452 U.S. 692 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972). Apparently because *Terry* involved the "stop and frisk" of an individual who seemed about to commit a robbery, the court of appeals here concluded that investigative stops are permissible only in "settings involving the investigation of ongoing crimes" (Pet. App. 8a-9a). In thus elevating the factual circumstances in *Terry* to a prerequisite for an investigative stop, the court of appeals clearly erred.

A. The court of appeals' conclusion ignores an entire line of post-*Terry* cases demonstrating that the *Terry* rule is not limited to the facts of that case. See *Michigan* v. *Summers*, 452 U.S. at 700; see also *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979) (White, J., concurring) (*Terry* is not an "almost unique exception to a hard-and-fast standard of probable cause"). *Terry*'s holding that investigative stops made on reasonable suspicion do not violate the Fourth Amendment rests on a balancing of the "limited intrusions on the personal security of those detained" against the "substantial law enforcement interests" advanced by permitting such brief detentions. *Michigan* v. *Summers*, 452 U.S. at 699. See also *Dunaway* v. *New York*, 442 U.S. at 209. Although the officer who observes an individual whom he reasonably suspects of having committed a past crime may not be in a position to prevent or halt ongoing criminal activity, he is certainly in a position to serve the "substantial law enforcement interest[ ]" in apprehending criminals and bringing them to justice. Such an officer is no more required "to simply shrug his shoulders and allow a * * * criminal to escape" (*Adams* v. *Williams*, 407 U.S. at 145) than the officer who has a reasonable suspicion of ongoing criminal activity. In either situation, "it may be the essence of good police work to adopt an intermediate response" by briefly stopping the suspicious individual "in order to determine his identity or to maintain the status quo momentarily while obtaining more information." (*id.* at 145-146).

Indeed, this Court's post-*Terry* decisions expressly state that law enforcement officers may make investigatory stops based on reasonable suspicion of past criminal activity. Thus, in *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), the Court recently observed that *Terry* stands for the principle that "certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person *has committed* or is about to commit a crime." Slip op. 6 (emphasis added). Likewise, in *Michigan* v. *Summers*, 452 U.S. at 699 n.9, the Court characterized its decision in *Brown* v. *Texas*, 443 U.S. 47 (1979), as holding that the statute

there at issue, requiring individuals to identify themselves, was unconstitutional as applied "because the police did not have any reasonable suspicion that the petitioner *had committed* or was committing a crime" (emphasis added). Perhaps the Court's clearest statement that investigative stops may be based on reasonable suspicion of past criminal activity came in *United States* v. *Cortez*, 449 U.S. 411 (1981). There, after stating that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity," the Court added that "[o]f course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct" (*id.* at 417 & n.2). See also *Kolender* v. *Lawson*, No. 81-1320 (May 2, 1983), slip op. 2 (Brennan, J., concurring).[9]

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[9] The court of appeals relied exclusively on *Florida* v. *Royer*, *supra*, for its conclusion that the stop in this case was impermissible under *Terry* and its progeny (see Pet. App. 6a-7a). But the Court in *Royer* held only that what had commenced as a reasonable investigative detention later escalated into "a more serious intrusion on [Royer's] personal liberty than is allowable on mere suspicion of criminal activity" (slip op. 10-11). That escalation occurred only after Royer had been taken to "a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions" (*id.* at 11). Clearly, the stop in the instant case did not escalate to the level found objectionable in *Royer* until the discovery of the firearms provided independent probable cause for arrest. Moreover, nothing in *Royer* even remotely suggests that investigative stops are limited to "settings involving the investigation of ongoing crimes" (Pet. App. 8a-9a).

In addition to this Court's decisions, several court of appeals decisions likewise indicate—explicitly or implicitly—that the *Terry* doctrine applies when an officer has reasonable suspicion of past criminal activity. See, *e.g.*, *United States* v. *Roper*, 702 F.2d 984, 989 (11th Cir. 1983); *United States* v. *Mobley*, 699 F.2d 172 (4th Cir. 1983), cert. denied, No. 82-6441 (Apr. 25, 1983); *United States* v. *Burnette*, 698 F.2d 1038, 1047 (9th Cir. 1983), cert. denied, No. 82-6532 (May 16, 1983); *United States* v. *Merritt*, 695 F.2d 1263, 1268 n.8 (10th Cir. 1982), cert. denied, No. 82-6305 (May 2, 1983); *United States* v. *Streifel*, 665 F.2d 414, 421 (2d Cir. 1981); *United States* v. *Sovi*, 662 F.2d 277, 283 (4th Cir. 1981), cert. denied, 455 U.S. 960 (1982).

B. Apparently because no crime was in progress when the Covington police stopped respondent, the court of appeals further held that "the government has not shown us any * * * 'exigent circumstances' that would have justified the Covington police in stopping [respondent]" (Pet. App. 8a). But people, like automobiles, are "readily movable"; like a car's contents, they "may never be found again if a warrant must be obtained." *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970). "Exigent circumstances" sufficient to justify a *Terry* stop exist whenever there are reasonable grounds to believe that the suspect was or is involved in criminal activity[10] and may flee or harm others. See *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 7; *Michigan* v. *Summers*, 452 U.S. at 702. Officer Cope would have demonstrated questionable police judgment and dedication to protecting the public had he failed to stop a suspect who was wanted but could not theretofore be located by Covington police officers (J.A. 31-32, 73, 77, 91, 99-100), who "took off" only moments earlier when he spotted another officer (J.A. 60), and who was reported to be armed and dangerous (J.A. 78-79, 97). See *Terry*, 392 U.S. at 23 (officer's failure to stop would have been poor police work).

C. It is thus clear beyond cavil that the law enforcement interests at stake in this case were substantial. And, on the other side of the *Terry* balance, the intru-

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[10] Even in the absence of a reasonable suspicion of criminal activity, officers may have the authority to detain individuals they reasonably believe to be material witnesses to a crime. *Kolender* v. *Lawson*, No. 81-1320 (May 2, 1983), slip op. 5 n.3 (Brennan, J., concurring).

sion undertaken by the Covington police could not have been more limited. Respondent was not moved or asked to move more than a short distance; and he was not searched or interrogated at the time of the initial stop. Officer Cope testified that he intended to detain respondent only long enough to determine whether there was an outstanding warrant for his arrest; had there been none (and had independent probable cause to arrest respondent not developed through the discovery of the guns), respondent would have been released (see page 7, *supra*). The stop was thus a far more limited intrusion than is permissible under the *Terry* doctrine. See *Kolender* v. *Lawson*, slip op. 3, 4 (Brennan, J., concurring) (During *Terry* stops, "[i]f [police officers] have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official 'show of authority,' the use of physical force to restrain him, and a search of the person for weapons"); *Florida* v. *Royer*, slip op. 7 (reasonable suspicion warrants a stop for questioning); *Michigan* v. *Summers*, 452 U.S. at 700 (*Terry* stops "not confined to the momentary, on-the-street detention accompanied by a frisk for weapons").

Depending perhaps upon the amount of the time required for the St. Bernard police to reach Covington, it may well be that the Covington police would have needed probable cause to take the action requested in the flyer of detaining respondent until the St. Bernard police could assume custody of him. Cf. *Dunaway* v. *New York*, *supra*. But it is undisputed on the record in this case that the Covington police did not intend to take the action requested in the flyer. Rather, as the radio transmission indicates (see pages 4-7, *supra*), the Covington police immediately sought to verify the existence of a warrant. Although it became unnecessary to continue these efforts when the police observed the

first gun in plain view in respondent's vehicle, it is clear that the court of appeals completely mischaracterized this case as an "arrest now, verify warrant later" situation (Pet. App. 9a). In reality, the facts show that this is a "stop now, try to verify warrant immediately" case. The court of appeals' totally unprecedented limitation on *Terry* stops thus requires reversal by this Court.

II

A "WANTED FLYER" ISSUED BY ONE POLICE DEPARTMENT PROVIDES OFFICERS OF ANOTHER DEPARTMENT WITH REASONABLE SUSPICION SUFFICIENT TO JUSTIFY A BRIEF STOP OF THE SUSPECT WHILE AN EFFORT IS MADE TO ASCERTAIN WHETHER AN ARREST WARRANT HAS BEEN ISSUED FOR THE SUSPECT

The court of appeals also erred in concluding that the stop of respondent's vehicle was unlawful because the wanted flyer failed to provide Officer Cope with sufficient facts upon which to make his own determination of reasonable suspicion. The flyer stated that respondent was "Wanted for Investigation Only for Aggravated Robbery" and supplied details concerning the robbery and respondent's identity (see page 3, *supra*). This information *by itself*—regardless of Officer Cope's knowledge of the facts giving rise to the flyer—fully justified the "intermediate response" of stopping respondent's vehicle and briefly detaining him in order to determine if a warrant for his arrest had been issued.[11]

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[11] Because the flyer was six days old, it was reasonable to anticipate that the information regarding respondent's participation in the robbery might have ripened into probable cause. By the same token, the flyer was hardly so old that it should have been disregarded as stale. The fact that respondent had not committed a traffic violation (Br. in Opp. 9) is totally irrelevant; Officer Cope's stop was based on the reasonable suspicion generated by the flyer.

The conclusion of the court below that the flyer was insufficient to justify the stop is at odds with numerous court of appeals decisions holding that an officer may make an investigative stop—or, where appropriate, an arrest—in reliance on a police wanted bulletin or radio lookout, and that he may do so even though he has no personal knowledge of the facts warranting such action. *See, e.g., United States* v. *Jackson*, 652 F.2d 244, 248-249 & n.3 (2d Cir.), cert. denied, 454 U.S. 1067 (1981); *United States* v. *Robinson*, 536 F.2d 1298 (9th Cir. 1976); *United States* v. *Vasquez*, 534 F.2d 1142, 1145 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *United States ex rel. Mungo* v. *LaVallee*, 522 F.2d 211, 214 (2d Cir. 1975), cert. denied, 434 U.S. 929 (1977); *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 400-40; (7th Cir.), cert. denied, 421 U.S. 1016 (1975); *United States* v. *Stevens*, 509 F.2d 683, 687 & n.6 (9th Cir.), cert. denied, 421 U.S. 989 (1975); *United States* v. *Hernandez*, 486 F.2d 614 (7th Cir. 1973), cert. denied, 415 U.S. 959 (1974);[18] *United States* v. *Impson*, 482 F.2d 197, 199 (5th Cir.), cert. denied, 414 U.S. 1009 (1973); *United States* v. *Maryland*, 479 F.2d 166, 169 (5th Cir. 1973); *Daniels* v. *United States*, 393 F.2d 359 (D.C. Cir. 1968); *Smith* v. *United States*, 396 F.2d 532, 533 (9th Cir. 1967). *See also United States* v. *Roper*, *supra* (upholding action of officer who, having seen bond company's flyer describing defendant and his

[18] The court below attempted to distinguish *Hernandez* on the basis that "the officer knew that the vehicle he stopped was thought to contain illegal aliens," and that "[h]is intrusion on the suspect's privacy was limited to the specific purpose of verifying or dispelling [the suspicion]" (Pet. App. 8a). But here Officer Cope likewise knew that the vehicle he stopped contained a suspected robber, and his intrusion was limited to the specific purpose of determining whether a warrant for his arrest had been issued. At the time of the stop in *Hernandez*, the officer had no more information than Officer Cope did when he stopped respondent.

vehicle and stating that defendant was wanted for federal bail jumping, stopped defendant's car for purpose of determining if a probation violation warrant for defendant's arrest had been issued); 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978) (quoted with approval in *Michigan* v. *Summers*, 452 U.S. at 700-701 n.12).

In general, these cases stand for the proposition that an officer who receives a police bulletin has "the same right" to make a stop or an arrest as the officer who issued the bulletin. *United States* v. *Jackson*, 652 F.2d at 249 n.3. As the Fifth Circuit stated in *United States* v. *Impson*, 482 F.2d at 199, an "officer can act on the basis of information of which he has no personal knowledge which has been relayed to him by police transmission facilities," but if the bulletin "is the sole cause for the detention * * * then the government has the burden of showing that the information on which the action was based *itself* had a reasonable foundation." *See also United States* v. *Robinson*, 536 F.2d at 1299-1300; *United States* v. *Stevens*, 509 F.2d at 687 n.6 ("[a] police officer is entitled to view information supplied via police radio as a trustworthy basis for his actions"); *Daniels* v. *United States*, 393 F.2d at 361. Cf. *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971) ("Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.").

At the same time as it facilitates effective law enforcement, this rule fully protects the Fourth Amendment rights of those detained or arrested by requiring that the police officer initiating the chain of communication have sufficient knowledge to constitute reasonable suspicion or probable cause. If the underlying flyer or arrest warrant is defective, the resulting stop or arrest

will not be insulated from challenge merely because officers in another jurisdiction apprehended the suspect. *Whiteley* v. *Warden*, 401 U.S. at 568. In a case such as this one, however, when the police officer who issues the wanted flyer has sufficient information to form a reasonable suspicion that the suspect has committed a crime,[19] an officer in another jurisdiction is entitled to rely on the flyer as a basis for detaining the suspect at least long enough to ascertain whether an arrest warrant has been issued. Cf. *Whiteley* v. *Warden*, 401 U.S. at 568 ("We do not, of course, question that the

[19] In the instant case, there is no question that the St. Bernard police officer who issued the wanted flyer had ample reason to suspect respondent of the robbery based on Janie Hansford's "detailed handwritten statement" (Pet. App. 2a). (Indeed, the district court "concluded that Janie Hansford's statement actually provided the St. Bernard police with a sufficient basis for probable cause" to arrest respondent (*id.* at 4a), a conclusion the court of appeals did not disturb.) Respondent's contention that Hansford's statement failed to provide probable cause to arrest respondent (Br. in Opp. 8-11) is not only irrelevant to the legality of the *Terry* stop, but is also based on a legally erroneous probable cause analysis. Respondent apparently is unaware that a "totality of the circumstances" approach governs the evaluation of information received from an informant. *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 15. Hansford was present at the Moon Tavern while plans for the robbery were being made (Pet. App. 2a); she admitted tangential participation (*id.* at 14a); her boyfriend's father told her that he and respondent were involved in the robbery (*id.* at 2a); and she provided a wealth of details concerning events surrounding the robbery (*id.* at 14a). Together, these facts almost certainly constitute sufficient evidence of both the reliability of Hansford's information and her veracity to support a "common-sense" determination that respondent was probably involved in the crime. But whatever the conclusion on probable cause (an issue not presented by this case), the existence of reasonable suspicion sufficient to justify a stop of respondent for questioning is beyond dispute.

[arresting] police were entitled to act on the strength of the radio bulletin.").

The practical basis for these decisions is clear: effective law enforcement would be impossible if police officers could not act on directions and information transmitted from one officer to another. As the court of appeals observed in *United States* v. *Robinson*, 536 F.2d at 1299, "officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." Moreover, the rule is as applicable to communications between different police departments or law enforcement agencies as it is to communications within a single department. See, *e.g.*, *United States* v. *Impson*, *supra*; *United States* v. *Maryland*, *supra*; *Smith* v. *United States*, *supra*. See also *United States* v. *Roper*, *supra*. Given the ease with which criminal offenders may move quickly among various police jurisdictions, officers in one jurisdiction must be able to respond swiftly to wanted bulletins from other jurisdictions without making time-consuming personal determinations as to the existence of reasonable suspicion or probable cause. The alternatives are a national police force or a requirement that officers turn their backs on suspected offenders simply because they lack personal knowledge of the facts leading to the issuance of a wanted bulletin. Nothing in the Fourth Amendment justifies either result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1984

RESPONDENT'S

BRIEF

No. 83-1330

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. HENSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Covington, Kentucky Police Department possessed the required probable cause to arrest the respondent when respondent committed no traffic violation but was arrested based on a "flyer" issued six days earlier by the St. Bernard, Ohio Police Department.

II. Whether Janie Hansford's handwritten statement was sufficient enough to arrest the respondent when she lacked the prerequisites for being a credible and reliable informant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1330

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS J. HENSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 713 F.2d 220. The order of the district court (Pet. App. 12a-15a) and the recommendation of the magistrate (Pet. App. 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on August 9, 1983. A petition for rehearing was denied on December 15, 1983 (Pet. App. 11a). The

petition for a writ on certiorari was filed on February 10, 1984, and was granted on May 21, 1984 (J.A. 140). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

On August 11, 1982, the respondent, Thomas J. Hensley, was indicted jointly with co-defendant, Albert Green, by a federal grand jury of the United States District Court for the Eastern District of Kentucky, charging each of them with violating 18 U.S.C. App. 1202 (a) (1), possession of a firearm by a convicted felon.

An evidentiary hearing was held on September 21, 1982, before a United States Magistrate relative to a motion to suppress filed by the respondent. The next day the Magistrate issued his recommended findings of fact and conclusions of law with the United States District court.[1] On September 28, 1982, and on October 4, 1982, in response to objections filed by the respondent, Thomas J. Hensley, the United States District Court held supplemental hearings concerning the motion to suppress evidence filed by the respondent. The United States District Court Judge for

[1] The United States Magistrate recommended that the respondent's motion to suppress be overruled, basing his decision largely on *Terry* v. *Ohio*, 392 U.S. 1 (1968). The Magistrate reasoned that Officer Cope possessed the required probable cause necessary to stop Hensley's vehicle because the officer had heard about a "flyer" out of Ohio regarding Hensley a week prior to the arrest. Furthermore, since a second police officer who arrived on the scene noticed a gun in the car, the ensuing search of Hensley's car in which all of the guns were found was predicated on the "plain view" doctrine according to the Magistrate.

the Eastern District of Kentucky overruled the respondent's motion to suppress on October 19, 1982.[2]

On October 25, 1982, after filing a waiver of trial by jury, the respondent was tried and convicted of violating 18 U.S.C. App. 1202 (a) (1). Subsequently, the respondent, Thomas J. Hensley, was sentenced to two years imprisonment.

The respondent appealed the United States District Court decision which had overruled his motion to suppress. In response to the respondent's appeal, the United States Court of Appeals for the Sixth Circuit reversed the lower court.[3] Upon a granting of the Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, the Solicitor General now seeks a reversal of the United States Court of Appeals' decision.

1.a. On December 10, 1981, Officer Kenneth Davis of the St. Bernard, Ohio Police Department interviewed Janie

[2] The United States District Court Judge affirmed the recommendation of the United States Magistrate. The District Court Judge deviated slightly from the Magistrates' conclusions of fact and law. The Judge felt the admission by Janie Hansford was not only against her own interest, but implicated the respondent to the point that the Covington Police possessed "the specific and articulable facts needed to underly a stop" as stated in *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968).

[3] The decision of the United States Court of Appeals is reported at 713 F.2d 220. The Court reversed the lower court; in part, because the flyer issued nearly two weeks before the arrest of respondent by the Covington Police lacked probable cause sufficient enough to justify the stop. Furthermore, the Court reasoned that a flyer issued two weeks prior to the stop did not create the exigent circumstances needed by the Covington Police to stop the respondent. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Warden* v. *Hayden*, 387 U.S. 294 (1967). In other words, the Court did not appreciate the fact that a warrant had not been issued for Hensley. Instead, the police in Ohio by-passed this procedure and, in effect, issued their own warrant to arrest.

Hansford concerning a robbery which occurred at the Moon Tavern in St. Bernard, Ohio.[4] The robbery had taken place on December 4, 1981. Ms. Hansford gave the Officer a 2½ page written statement describing her knowledge of a robbery. Her statement, set forth below, implicates an individual named "Tommy":

VOLUNTARY STATEMENT

DATE 12-10-81 PLACE CCI

Time Statement Started 1:55 p.m.

I, the undersigned, Janie Hansford, of 4233 Allendorf, being 24 years of age, born at Jacico, Tennessee, on 5/9/57, do hereby make the following statement to P.O. Kenneth Davis, he having first identified himself as a St. Bernard Police Officer, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

On Dec. 4, 1981, Alan Pfeiffer asked me to go to the Moon Tavern with him to have a few drinks at about

[4] The Solicitor General's Office erroneously believes that Ms. Hansford was involved in the robbery, and therefore, gave a statement which implicated her in the crime. The fact is, she had nothing to do with the crime. She merely accompanied Alan Pfeifer, at his request, to the Moon Tavern to have a few drinks. Mr. Pfeifer asked the bartender when the Tavern opened in the morning and apparently received a response. Ms. Hansford never indicated that she knew the Moon Tavern was to be robbed. Furthermore, she was not indicted nor has she ever testified in any trial about the robbery

1:30 a.m. At this time when we arrive I had order drinks. Alan ask a heavy set Lady who was tented bar what time they open. She said about 5:30 a.m. About 2:00 a.m. we left and went to Alan place and we spent the night. About 3 a.m. the phone ring and it was Sonny he asked Alan what time the place open he said about 5:30 a.m. I ask Alan what that was about he said his dad wants to know what time the Moon Tavern open. Sat at 1:30 a.m. Sonny told me at his house that they had had robbed the Moon Tavern and that he also show me some money that had red ink on the edge of it he said it came from the Moon tavern if I didn't think he meant it I could call and ask them. So I did the girl said they had been robby. On Mondayny Dec 7 1981 About 8 p.m. Sonny told me that when out and stold a mustang which was the car was in the Moon Tavern robby. He said Tommy was driving the car when they did the jop at the Moon tavern. Dale told also that he had set at the bar and had a drink a beer before they did the jop. Sonny told me the him & Dale went in and did the jop & Tommy was outside the door waiting for him. They he said Tommy & him ran & Dale went back in and did some Chismas shopping.

I have read this statement consisting of 3 page (s) and the facts contained therein are true and correct.

WITNESSES P.O. Kenneth Davis

Janie Hansford

Signature of Person giving voluntary statement

TIME STATEMENT FINISHED A.M. 3:00 P.M.

It is important to note that no where in the affidavit is the respondent's name listed and that over the objection of counsel the Government was permitted to testify beyond

the four corners of the document (J.A. 93).[5] Upon this information the St. Bernard Police Department issued a "flyer" for investigation only.[6]

b. Six days later and in response to the "flyer", a Covington, Kentucky Police Officer, Daniel Cope, stopped the respondent, Thomas J. Hensley, while the latter was driving his car within the city limits of Covington, Kentucky.[7] The

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[5] See Fed.R.Cr.P. 41(c); *United States* v. *Seta*, 689 F.2d 400 (6th Cir. 1982); *United States* v. *Chafin*, 622 F.2d 927 (6th Cir. 1980); *Tabasko* v. *Barton*, 472 F.2d 871 (6th Cir. 1972).

[6] In its entirety, the flyer reads as follows:

"Wanted for Investigation only for Aggravated Robbery"
Wanted for Investigation for Aggravated Robbery which occurred at the Moon Tavern, 631 Vine Street, St. Bernard, Ohio on December 4, 1981 at 6:19 a.m., is one Thomas James Hensley, M/W-1/18/44, CTL No. 21528, PICs #323, SS-295366974, 88F, 190 lbs. LKA as of 12-7-81 was Drake Motel. If subject is located pick up and hold for St. Bernard Police. Use caution and consider subject armed and dangerous.

Officer Davis testified in one suppression hearing that he felt he had probable cause to arrest the respondent

Q. Did you feel at the time you issued that flyer that you had a basis to arrest Mr. Hensley?
A. With the statement alone.
Q. With what you ——— ———
A. I felt like we had enough probable cause in the State of Ohio to bring him in for investigation, yes, sir.
Q. That didn't answer my question. You issued a statement saying stop for investigation only; is that correct? You issued that did you not?
A. Yes, I did, but when we bring somebody in for investigation they are under arrest technically. (J.A. 95)

[7] Officer Cope testified that he had no personal knowledge of the robbery in Ohio (J.A.91). The flyer had been read to him during roll call each morning of the previous week (J.A. 91). Furthermore, Officer Cope testified that the flyer was the sole reason for pulling Mr. Hensley over, not a traffic violation or local warrant (J.A. 79).

officer got out of his vehicle with his pistol drawn and ordered the respondent and his passenger, Albert Green, to get out of the car and place their hands on the trunk. Both the respondent and Albert Green complied.

Moments later a backup unit arrived containing Officer David Rassache. He too left his vehicle and proceeded to investigate. As he approached the respondent's car he looked inside the car because Green had left the passenger door open. Upon viewing the interior of the car the officer saw the butt end of a gun protruding from under the passenger seat. Following this discovery, Officer Rassache proceeded to search the entire vehicle and located two more guns. The officers subsequently arrested both the respondent and Albert Green for possession of hand guns by convicted felons, specifically 18 U.S.C. App. 1202 (a) (1).

SUMMARY OF ARGUMENT

The court of appeals' decision that the stop in this case violated the respondent's Fourth Amendment rights was a refusal of the court to expand the *Terry* doctrine to encompass police actions which amount to rounding people up against whom arrest warrants may have been issued. There is no question that when Officer Cope pulled Hensley over, ordered him to get out of his car and held him at gunpoint, the Officer had effected a "seizure" within the meaning of the Fourth Amendment. *Terry* v. *Ohio*, 392 U.S. 1, 16 1968; *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1978). In light of the facts and circumstances which led up to the arrest of Hensley, there can be no doubt that the court of appeals made the correct decision.

The United States Supreme Court had held that in order to justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken

together with rational inferences from those facts reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 20-21. The court in that particular case was considering the seizing of an individual by police where swift action was necessary to stop the possibility of a crime which was about to take place. In *Adams* v. *Williams*, 407 U.S. 143 (1972), the court extended the *Terry* rational to an investigated stop based on an informant's tip rather than on the officer's own observations. *Id.* at 145. However, the court has never allowed the police to issue their own warrants. Nor has the court permited officers of one jurisdiction to arrest a suspect based on a warrant issued by another jurisdiction which lacks probable cause for an arrest. *Whiteley* v. *Warden*, 401 U.S. 560 (1971). In fact, the court of appeals is more than correct in stating that "Despite the expansive trend embodied in this line of cases, the recent case of *Florida* v. *Royer*, — U.S. —, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), demonstrates that the court still considers the investigative stop a narrowly drawn exception to the rule that police must have probable cause to make a seizure." *United States* v. *Hensley*, 713 F.2d 220, 224 (6th Cir. 1983).

There is also a question concerning what led the St. Bernard Police to issue the so-called "flyer". Ms. Hansford's handwritten statement never mentions the respondent, Thomas Hensley, by name nor does it implicate her in the robbery. Furthermore, the St. Bernard Police did not even attempt to corroborate Ms. Hansford's statement which is required under the recent decision in *Illinois* v. *Gates*, No. 81-430 (June 8, 1983). There is also no evidence offered by the Government that Ms. Hansford was a reliable, previously used informant. *Adams* v. *Williams*, 407 U.S. 143. The only conclusion that can possibly be drawn from this statement is that it was totally unreliable and lacked the necessary prerequisites for obtaining a warrant.

ARGUMENT

I

THE "WANTED FLYER" ISSUED BY THE ST. BERNARD POLICE AND THE ACTIONS OF THE COVINGTON POLICE WERE TANTAMOUNT TO UNBRIDLED, UNLIMITED POLICE PRACTICES WHICH IF APPROVED BY THIS COURT, WOULD ABOLISH THE ENTIRE WARRANT PROCESS

The case of *Whiteley* v. *Warden*, 401 U.S. 560, explicitly prohibits the type of actions taken by the St. Bernard and Covington Police Departments.[8] The Court held that the

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[8] In *Whiteley*, two different police forces were involved. Sheriff Ogburn issued a message transmitted throughout Wyoming, which gave a name and description of the defendant, Harold Whiteley, as well as a description of his car. A Laramie police officer, relying on the information, arrested the defendant. Sheriff Ogburn's complaint contained the following information:

> I, C. W. Ogburn, do solemnly swear that on or about the 22nd day of November, A.D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building . . . *Id.* at 563.

The information received by the resting Laramie patrolman stated:

> P & H for B & E Saratoga, early A.M. 11-24-64. Subj. #1. Jack Daley, WMA, 28, D.O.B. 2-29-36, 5' 10", 175, med. build med. comp., blonde and blue. Tat. left shoulder 'Love Me or Leave Me.' #2. Harold Whitley, WMA, 43, D.O.B. 6-22-21, 5' 11", 180, med. build, fair comp. brown eyes. Tat. on right arm 'Bird'. Pres. driving 1953 or 1954 Buick, light green bottom, dark top. Wyo. lic. 2-hal. unknown. Taken: $181.71 in small change, numerous old coins ranging from 3c pieces to silver dollars, dated from 1883 to 1908. Warrant issued, will extradite. Special attention Denver. . . ." *Id.* at 564.

complaint issued by one police department could not support a finding of probable cause; and therefore, the arresting police department's arrest of the defendant violated his constitutional rights under the Fourth and Fourteenth Amendments. *Id.* at 569. The Court went on to state:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers to make the arrest. *Id.* at 568.

The Court in *Delaware* v. *Prouse*, 440 U.S. 648, 655, reiterated its position on the use of unlimited police powers by stating "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. See *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983). If the Court accepts the Government's position in this matter, police officers around the country will have unbridled discretion to arrest without a warrant any individual, reasonably or unreasonably suspected of having committed a crime. In other words, a warrant for arrest will no longer be needed under any circumstances which, in effect, abolishes the idea that a neutral and detached magistrate will be there to monitor police conduct.

Beck v. *Ohio*, 379 U.S. 89 (1964), is yet another case in which the Court has refused to allow police officers total, unlimited discretion to make warrantless arrests. In *Beck*, the defendant was arrested while driving his car, not for a traffic violation, but because the arresting officer had a pic-

ture of the defendant, knew he had been connected with criminal activity in the past and the officer had heard reports that the defendant was involved in present criminal activity. *Id.* at 93, 94. The Court held that "No decision of this Court has upheld the constitutional validity of a warrantless arrest with support so scant as the record presents." *Id.* at 95. When Officer Cope pulled the respondent's car over there was in existence a flyer which named the respondent, his last known address and the possibility that he was armed and dangerous. As in the *Beck* case, such information is insufficient to have allowed the warrantless arrest of the respondent.

The Government cites a number of cases to support its position that sufficient exigent circumstances existed to warrant the respondent's arrest. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *United States* v. *Place*, No. 81-1617 (June 20, 1983); *Michigan* v. *Summers*, 452 U.S. 692 (1981); *United States* v. *Daniels*, 393 F.2d 359 (D.C. Cir. 1968); *United States* v. *Burnett*, 698 F.2d 1038 (9th Cir. 1983). All of these cases deal with exigent circumstances which required police to act during or shortly after a crime had taken place. Furthermore, warrants could not be retrieved in a number of these cases because the identity of the defendant was totally unknown. Thus, such cases are inapplicable to the case at bar. There were no exigent circumstances which required immediate apprehension of the respondent. When Officer Cope pulled the respondent's car over there had been no traffic violation committed (J.A. 79). Also, the radio transmissions just prior to the arrest show that the Covington police knew where the respondent lived and that he was going in the direction of his home (J.A. 77).[9] The Covington Police Department could have

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[9] Dispatcher: 606, can you identify the vehicle?

taken more time to verify whether a warrant actually existed. Once the officers determined that no warrant had been issued they could have simply gone about their business and left the respondent alone.[10]

The Government also seeks a balancing test whereby the interests of law enforcement officers are pitted against the interests of the individual citizen. The Court in *Dunaway* v. *New York*, 442 U.S. 200, 211 (1979), rejected such a notion. Again, like many of the cases cited above, the facts in *Dunaway* are quite similar to the facts present in this case. The police in *Dunaway* questioned an informant but there was insufficient evidence to obtain a warrant. Regardless of this fact, the police arrested the defendant and held him for investigation. *Id.* at 203. The Court held that such action was a violation of the defendant's rights as provided by the Fourth and Fourteenth Amendments. *Id.* at 214. See *Brown* v. *Illinois*, 422 U.S. 590 (1975).

The Government believes the police in situations such as this have a substantial interest which outweighs the limited

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[Officer Eger]: White over white Cadillac El Dorado, I believe.

[Officer Rassache]: They will probably go to Trevor Street ord 806 Holman.

[10] The Government also cites a number of border search type cases to justify the actions of the Covington Police Department. See, *e.g.*, *United States* v. *Vasquez*, 534 F.2d 1142 (5th Cir. 1976); *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Hernandez*, 486 F.2d 617 (7th Cir. 1967). The police in each case were justified in their actions due to the fact more than a reasonable suspicion of ongoing criminal activity was present. Also, the police in these cases did not know specifically the person or persons involved in the criminal activity. Thus, a warrant for their arrest would have been a ludicrous idea. The St. Bernard and Covington Police Departments, on the other hand, simply did not know for certain whether the respondent had actually engaged in past or present criminal activity.

intrusions made on the individual man or woman. The respondent respectfully disagrees. A review of the court of appeals' decisions around the country shows a definite split of authority concerning this issue. See, *e.g.*, *United States* v. *Robinson*, 536 F.2d 1298 (9th Cir. 1976); *United States* v. *LaVallee*, 522 F.2d 211 (2nd Cir. 1975); *United States* v. *Impson*, 482 F.2d 200 (5th Cir. 1973); *United States* v. *Mobley*, 699 F.2d 172 (4th Cir. 1983); *United States* v. *Merritt*, 695 F.2d 1263 (10th Cir. 1982); *United States* v. *Maryland*, 479 F.2d 566 (5th Cir. 1973); *United States* v. *Sturges*, 510 F.2d 397 (7th Cir. 1975); *United States* v. *Jackson*, 652 F.2d 244 (2nd Cir. 1981). The Covington Police pulled the respondent over, not for a traffic violation, but because of a flyer out of Cincinnati. The arresting officer asked the respondent to get out of the car and place his hands on the trunk. The whole time this occurred the officer had his gun drawn (J.A. 78). Such action is certainly more than a petty indignity or a limited intrusion upon an individual, which is what the Government is arguing.

The Government simply wishes the Court to apply a *Terry* like rationale to this case which, to say the least, is totally unwarranted. In *Terry* v. *Ohio*, 392 U.S. 1, 10-11, the Court held that where there is a reasonable suspicion that criminal activity is about to take place, an observing police officer may stop and frisk the suspicious individual. The Government argues *Terry* should be used to allow police to accost any individual based upon what the police think may be a reasonable suspicion. But *Terry* also stated that whenever it is practicable, the police must obtain judicial approval before seizing a person. The St. Bernard Police could have attempted to get a warrant. They did not. The Covington Police could have taken a few more minutes to verify the warrant prior to initiating the stop of the respondent. They decided to arrest first, verify later.

Such practices should not be permitted and as a result, the evidence seized from respondent's car should not have been admitted. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

ARGUMENT

II

JANIE HANSFORD'S STATEMENT GIVEN TO THE ST. BERNARD POLICE DEPARTMENT LACKED SUFFICIENT PROBABLE CAUSE TO ISSUE A WARRANT FOR RESPONDENT'S ARREST; THUS, THE SUBSEQUENT FLYER ISSUED CANNOT BE USED TO JUSTIFY THE ARREST OF THE RESPONDENT

The latest decision which deals with the reliable informant problem is *Illinois* v. *Gates*, No. 81-430 (June 8, 1983). The Court replaced the two-pronged test announced in *Aguilar* and *Spinelli* with a "totality of circumstances" test. Slip op. 16. Justice Rehnquist delivered the opinion of the Court which defines the magistrate's job of issuing warrants when an anonymous informant is the source. The issuing magistrate must "simply make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* Note the informant in *Gates* was anonymous to the police unlike the informant in *Adams* v. *Williams*, 407 U.S. 143. The Court in that case held that information gained from a reliable, previously used informant was sufficient enough to justify a forcible stop and search of a

suspect that was believed to be armed and dangerous. *Id.* at 146.

Besides the obvious lack of writing skills in her statement, Ms. Hansford's so-called detailed, handwritten statement presents a number of problems for the Government. First, the statement is pure hearsay from beginning to end because she merely stated what she had been told by other parties. Second, it never mentions the name "Thomas Hensley". The statement only speaks of an individual named "Tommy". Third, the St. Bernard Police Department never really attempted to verify what Ms. Hansford told them as was done in Gates. In fact, Officer Davis admitted that he felt the statement was insufficient to get a warrant for the respondent's arrest.[11] Officer Davis simply

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[11] Officer Davis, who issued the wanted flyer, testified at a second suppression hearing as follows:

> Q. On the basis of that statement (Hansford's), you issued a flyer for investigation only; is that right?
> A. Yes.
> Q. And at that point, you felt—you had more than a suspicion let's say, but you had less than probable cause to get a warrant; is that fair to say?
> A. At that particular time—
> Q. You felt some more investigation was needed?
> A. At that particular time, I wanted to talk to him.
> Q. So therefore you issued a warrant for investigation only?
> A. Correct.
> Q. And you didn't get a warrant for his arrest at that time—not until much later; is that right?
> A. No, not at that time.
> (J.A. 136).

This statement, as well as Officer Davis' prior statement at an earlier suppression hearing (See Footnote 6), shows that he believed that he had the power and authority to arrest the respondent without probable cause or reasonable suspicion. The officer was under the erroneous impression that he could stop and detain any individual for up to seventy-two hours for purposes of investigating a crime (J.A. 95).

issued a wanted flyer on the belief that he could pick up the respondent and detain him for seventy-two hours (J.A. 75). Thus, the whole idea of the neutral and detached magistrate issuing an arrest warrant was totally circumvented. And finally, there is the question of whether Ms. Hansford's statement was even reliable. Contrary to the Government's viewpoint, this woman never implicated herself in the underlying crime. She was never charged nor has she ever testified concerning the robbery. Therefore, Janie Hansford's statement lacked not only probable cause required for a warrant, but also reliable information upon which this "flyer" was issued.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

No. 83-1330

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we demonstrated that the court of appeals committed two clear errors in this case. First, in a totally unprecedented ruling, the court held that investigative stops are permissible only in "settings involving the investigation of *ongoing* crimes" (Pet. App. 8a-9a (emphasis added)). Second, the court held that the stop of respondent's vehicle by officers of the Covington, Kentucky, police department was unlawful because the "wanted" flyer issued by the St. Bernard, Ohio, police department failed to provide the Covington officers with sufficient facts upon which to base their own determination of reasonable suspicion (*id.* at 9a). Respondent has utterly failed to acknowledge, let alone answer, our refutation of the court's first holding, and thus no reply is necessary as to that issue. The discussion in our opening brief (at 12-17) conclusively shows that the court of appeals' novel restriction on *Terry* stops is utterly without basis and contrary to numerous decisions of this Court.

With regard to our second contention, respondent's entire brief is flawed by his apparent unwillingness or inability to distinguish between an arrest, which requires probable cause, and an investigative stop, which requires only reasonable suspicion.[1] Respondent repeatedly challenges the authority of the Covington police to *arrest* him in reliance on the "wanted" flyer, claiming that the flyer failed to provide the Covington police with probable cause for an arrest. See, *e.g.*, Br. I, 10, 11, 13, 16. As we explained in our opening brief (at 7, 11, 16-17), however, the Covington officers did not arrest respondent on the basis of the "wanted" flyer. Rather, respondent was *stopped* for the purpose of determining, as rapidly as possible (see *ibid.*), whether there was an outstanding warrant for his arrest. The actual arrest of respondent — as opposed to the initial stop — was made not on the basis of the "wanted" flyer but instead as the result of independent probable cause that developed when one of the Covington officers, knowing respondent and his passenger to be convicted felons, spotted a firearm in plain view in respondent's vehicle (*id.* at 7-8).

Inasmuch as respondent does not even suggest that his arrest based on the Covington officer's observation of a firearm in plain view lacked probable cause, the only police action at issue in this case is the initial stop of respondent's vehicle. Respondent argues (Br. 13) that the Covington officers should have "taken a few more minutes to verify [the existence of] the warrant prior to initiating the stop of

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[1]Even as to probable cause, respondent's brief demonstrates considerable confusion. For example, respondent asserts (Br. 12 n. 10 (emphasis added)) that the police in this case "simply did not know *for certain* whether the respondent had actually engaged in past or present criminal activity." It is axiomatic that "certainty" is not required to establish probable cause, much less reasonable suspicion. See, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 16.

the respondent." Respondent does not explain how this would have been practicable, and clearly it would not. Respondent "took off" in his automobile as soon as he spotted one of the Covington officers (J.A. 60). The officers were able to make an educated guess as to respondent's destination (*ibid.*), but obviously they could not have known whether their surmise would prove correct. In these circumstances, failure to make an immediate stop would have bordered on dereliction of duty.[2]

Again refusing to distinguish between an investigative stop and an arrest, respondent finally contends that the statement given by Janie Hansford to the St. Bernard police "lacked sufficient probable cause to issue a warrant for respondent's arrest" and therefore could not be used "to justify the arrest of the respondent" (Br. 14). Respondent's contention that the statement failed to provide probable cause for respondent's arrest is wholly irrelevant to this case because the statement was not used for that purpose; rather, it was used as the basis for the "wanted" flyer that resulted in the stop of respondent's vehicle. The pertinent inquiries, therefore, are, first, whether Hansford's statement gave the St. Bernard police reasonable suspicion to justify stopping respondent and, second, whether the Covington police could rely on the knowledge of the St. Bernard police.

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[2]Respondent also contends that the St. Bernard police "could have attempted to get a warrant" (Br. 13). Respondent may well be correct, but the contention is irrelevant to this case. The question is whether the Covington police were justified in stopping respondent for the purpose of *finding out* whether the St. Bernard police had obtained a warrant. Since it is undisputed that the Covington police planned to release respondent if they had learned that there was no warrant (and if independent probable cause for arrest had not developed), the apparent failure of the St. Bernard police to seek a warrant has no bearing on the reasonableness of the investigative stop by the Covington officers. All that is pertinent is whether the St. Bernard police, had they come across respondent themselves, could have stopped him for questioning. As we demonstrate in text, they clearly could have done so.

Focusing first on the St. Bernard police, it is abundantly clear that Hansford's statement provided them with reasonable suspicion to justify a stop of respondent for questioning (had they encountered him before he was stopped by the Covington police). Hansford was present at the Moon Tavern while plans for the robbery were being made (Pet. App. 2a); she admitted tangential participation in the robbery (*id.* at 14a);[3] her boyfriend's father told her that he and respondent were involved in the robbery (*id.* at 2a);[4] and she provided a wealth of details concerning events surrounding the robbery (*id.* at 14a). Taken together, these facts unquestionably establish that the St. Bernard police would have been justified in stopping respondent for questioning.[5] That

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[3]Respondent repeatedly contends (Br. 4 n.4, 16) that Hansford never implicated herself in the robbery. But the district court found to the contrary (Pet. App. 14a), and the court of appeals did not disturb that finding. Accordingly, the finding should be accepted by this Court. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Even if the finding were to be discounted, however, Hansford's statement still contained sufficient detail, described in text, to supply the St. Bernard police with the requisite reasonable suspicion needed to justify stopping respondent.

[4]Respondent complains (Br. 4, 5, 15) that Hansford's statement identified respondent only as "Tommy" and not as Thomas J. Hensley. Respondent acknowledges (Br. 15) Hansford's "obvious lack of writing skills," however, and suggests no reason why the St. Bernard police could not rely on their knowledge (see J.A. 94) that Hansford was referring to respondent. Hansford's statement was neither utilized nor intended to be utilized as a sworn affidavit to be presented to a magistrate. Rather, it formed the basis for the St. Bernard police department's determination that there was reason to believe that respondent had been involved in the robbery. In these circumstances, the officers were entitled to rely on matters outside the "four corners" of the statement, including the fact that they knew that Hansford's reference to "Tommy" was a reference to respondent. Accordingly, the cases cited by respondent (Br. 6 n.5) for the proposition that an affidavit for a search warrant may not be supplemented by oral testimony are irrelevant to this case.

[5]Of course, if the St. Bernard police had stopped respondent for questioning, he would have been free, in the absence of probable cause, to decline to answer any questions and to leave when probable cause

conclusion, in turn, compels the conclusion that the Covington police were likewise justified in stopping respondent long enough to determine whether the St. Bernard police had issued a warrant for respondent's arrest. Nowhere in his brief does respondent refute our argument (Br. 17-21) that officers of one department may rely on information furnished by another department so long as the initiating department possesses the requisite level of suspicion for the action taken. That standard was clearly satisfied in this case.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1984

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failed to develop. See, *e.g.*, *Florida* v. *Royer*, 460 U.S. 491, 497-498, 503 (1983).

It is true, as respondent notes (Br. 15 n.11, 16), that one of the St. Bernard officers apparently believed that he could stop and detain a suspect for questioning for up to 72 hours. This mistaken belief has no bearing on the case, however, because it was never acted upon.

[illegible]